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Office Hours: Mondays 2-3:30 pm and by appointment

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LAW 573 Spring 2023- 3 credits

MonWed 10:25AM-11:55AM

Room 4700/4750

DISPUTE RESOLUTION: THEORY, PRACTICE, AND POLICY

Course Description

This course will examine 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 2 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. You will learn fundamental skills of negotiating, interviewing,

listening, counseling clients, making case presentations, persuasion, argument, legal reasoning and critical reasoning. We will also explore complex policy and legal issues in the uses (and abuses) of some of these processes, such as the current controversies in the uses of mandatory contractual arbitration and efforts to regulate such practices.

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” and “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, Grading and Assessment

This course will involve reading, discussion, and 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 may affect your final grade. There will be one short written assignment during the semester and a final take home examination. Grades and quality assessment will be based on written work, class contributions, and participation and performance in class exercises and simulations.

Class Participation (contributions and quality of participation in class discussion and role-play simulations): 15%

Short Papers: 15%

Final Examination: 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 books are:

Menkel-Meadow, Love, Schneider, and Moffitt, Dispute Resolution: Beyond the Adversarial Model 3rd ed. (Aspen, 2019). (hereinafter "Text").

Menkel-Meadow, Very Short Introduction to Negotiation (Oxford University Press, 2022-available on Amazon and OUP Press). (hereinafter, "VSI Negotiation").

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)
5. Michael Moffitt & Andrea Kupfer Schneider Dispute Resolution: Examples and Explanations (4th ed. 2020 WoltersKluwer)
6. Thomas Schultz & Thomas D. Grant, Very Short Introduction to Arbitration (Oxford Univ. Press 2021).
7. Lisa Blomgren Amsler, Janet Martinez & Stephanie Smith, Dispute System Design (Stanford Univ. Press 2020)

Please be prepared—you may be called upon to be an “expert” on a particular reading or topic for a particular class.

Learning Objectives

In this course you will learn:

1. The basic theories and elements of legal negotiation, including analysis of what is at stake (the “science” of dispute resolution) and behavioral repertoires (the “art” of dispute resolution) for producing good agreements;
2. Consideration of learning client objectives, through interviewing and counseling tools and techniques;
3. Social scientific findings about human decision-making and behavior in conflict and dispute, as well as transactional, settings;
4. How to present persuasive cases on behalf of clients seeking to accomplish legal outcomes in advocacy settings, such as arbitration and negotiation, as well as in conflict resolution settings, such as mediation and negotiation and their respective differences in different settings;
5. How to assess which process is appropriate for what kind of legal matter;
6. Legal analysis and reading of applicable statutes, cases and policy reports on which processes are legally and socially appropriate for what kinds of matters;
7. How to assess and combine different forms of process to create hybrid processes for different levels of legal decision making, particularly with respect to the number of parties and issues at stake;
8. How to apply critical legal and social scientific analysis to assessment of particular legal forms of problem solving and legal decision-making.
9. Analysis of complex legal issues (e.g., Constitutionality of arbitration requirements in domestic and international settings);
10. How to assess policy directives in specifying forms of dispute resolution in different contexts;
11. How to draft contracts or develop dispute resolution menus or “tiers” of dispute resolution within organizations (e.g., development of skills and analysis in dispute system design).

These learning objectives will be assessed in different modalities as listed above—written work (papers and exams), class performance in oral presentations, and decision making and role-play exercises as well as quality of legal and policy analysis throughout the course.

Course Page:

Students must use the ALTERNATIVE DISPUTE RESOLUTION Canvas course page to find additional readings and in-class assignments. To access the Canvas course page, please follow the instructions below:

- (1) Visit <https://canvas.eee.uci.edu>

- (2) Enter your UCInetID and password
- (3) <https://canvas.eee.uci.edu/courses/51116> is the link for this course where postings, readings and other announcements will be found; including Power Points (after class has occurred).
- (4) *Alternative Dispute Resolution, Course 573* should appear on the homepage. If the course does not appear, then click **Dashboard** on the left navigation to access the course. If you do not see *Alternative Dispute Resolution* on your Dashboard, click on **Courses**, then **All Courses** to access the course. Be sure to click on the **star** next to *Alternative Dispute Resolution* so it will appear in your Dashboard.

To learn more about how to use Canvas, visit <https://community.canvaslms.com/docs/DOC-10701-canvas-student-guide-table-of-contents>. If you are still having technical difficulties, email eee@uci.edu with the Canvas course page URL and a screenshot of your issue in the message.

Confidentiality

Many of the simulation and role play problems depend on confidential instructions. Some of the time you will work with a partner and often you will work in larger groups working on the same side of a case or transaction. It is important that you not share instructions about a problem until you are told you can do so by the instructor (following the de-briefing of an exercise). Your honesty, integrity and ethical conduct here will not only count in your grade but in how you are seen by your peers, as well as by your instructor. If you have any questions about the confidentiality of any facts, ask the instructor.

Attendance:

UCI Law's Academic Rule I.L. requires that students attend the classes in which they are enrolled. The rule also states that "[i]f a student must miss a class because of an unavoidable urgent matter, the student is responsible for contacting the instructor or the Assistant Dean for Student Services as soon as the problem presents itself."

UCI Law's Policy on Attendance and Verification of Student Identity requires instructors to use UCI Law's Attendance App to verify attendance at each Distance Education course in order to comply with ABA Standard 306(f). <https://www.law.uci.edu/academics/registrar/policies/attendance-and-id.html>.

Under UCI Law's Policy on Attendance and Verification of Student Identity, an instructor may prohibit a student from taking the final examination, submitting a final paper, or participating in or receiving credit for other graded class activities, if the instructor determines that the student's attendance has been unsatisfactory. However, the instructor must first notify the student in writing of the unsatisfactory attendance record and warn the student about the consequences if attendance is not corrected. The student will have an opportunity after the warning to improve attendance in the course.

As an attorney, you will be expected to attend required court hearings, conferences, and client meetings. Similarly, you must be prepared for, arrive on time to, and attend all synchronous and asynchronous sessions of this class, as well as all other class-related meetings.

If you must miss a class session or other class-related meeting due to an unavoidable urgent matter OR illness or family care-related reason, please contact me **by e-mail before that class** to discuss your absence and request an excused absence. If you are not comfortable explaining the reason for your absence to me, please contact the Assistant Dean for Student Services, Kyle Jones.

This class requires you to participate in some role-plays and simulations in class (and a few outside of class, which you may do in person or on Zoom or by email as provided for in class instructions. Thus, the learning of all your classmates depends on your presence in every class and your participation in assigned roles or simulations.

If you miss a class, you are responsible for learning the information you missed, including accessing any handouts, assignments, or other materials that I distributed in your absence on Canvas or via e-mail; and handing in any assignments that were due in the class.

If you accumulate 2 (two) or more unexcused absences, your grade in the course may be affected.

Class Recordings:

This class is not recorded since classes involve student confidential performances and proprietary intellectual property. PowerPoint summaries of classes will be provided on the Course Page, following each class. If you miss a class where a video, film or other material is shown you will have to see me to make provisions for out of class review.

Please note that student recording of class sessions by any means is prohibited.

Replication, redistribution, sharing, or posting of a class recording without my express written permission is strictly prohibited. **Students who violate this policy are subject to disciplinary action under the Honor Code.**

Disability Services:

UCI affords all students with disabilities equal access under the law. If you are in need of accommodation under the Americans with Disabilities Act (ADA) or similar statute, you must contact the Disability Services Center (DSC) at (949) 824-6272, or preferably, complete the intake form available at this link: <https://portal.dsc.uci.edu/intake/>. DSC will contact you within five business days to schedule an appointment with the Law School DSC Counselor.

Academic Integrity:

UCI takes academic honesty very seriously. You are responsible for knowing and adhering to the explicit details of our policies available at the link below:

<https://www.law.uci.edu/academics/registrar/academic-rules.html>.

You are also responsible for ensuring that your conduct conforms with UCI Law's Honor Code at all times

(https://www.law.uci.edu/academics/registrar/policies/UCI_Law_Honor_Code.pdf).

In addition, you are responsible for complying with my specific instructions about the rules governing each individual and group assignment.

Inclusivity Regardless of Citizenship:

The University of California supports all students regardless of immigration status. Thus, this course will work to make sure that all students feel included and respected in order to best heighten each student's academic experience. If you feel that you need assistance because you are affected by either your immigration status or that of a loved one (family member, parent, friend, partner), please contact the UCI DREAM Center at dream@uci.edu.

Student Health and Wellness:

Your instructors want you to thrive at UCI, and we believe that your physical and emotional well-being are the pathways to getting there. We encourage you to do your best to maintain a healthy lifestyle this semester by eating well, exercising, getting educated about the effects of illicit drugs and alcohol, getting enough sleep, and taking some time to relax. This will help you achieve your goals and cope with stress.

All of us benefit from support during times of struggle. You are not alone. There are many helpful resources available on campus and an important part of the law school experience is learning how to ask for help.

Here at the Law School, Student Affairs and Student Services are available to help you with personal and academic advising, counseling, and referrals. Please feel free to reach out to Dr. Jennah Jones, Assistant Dean for Student Affairs and Inclusive Excellence (jjones@law.uci.edu, 949-824-1304), or Dean Kyle Jones, Assistant Dean for Student Services (kjones@law.uci.edu, 949-824-1384).

You should also consider reaching out to the **Counseling Center** (counseling.uci.edu; 949-824-6457). The Counseling Center provides urgent care/walk-in services, crisis intervention, brief individual and couples counseling, groups, and workshops on a variety of personal and academic issues. There is a Satellite Office at the Law School, (and virtual Law School hours during COVID) where Dr. Diana Chan will provide short-term therapy to help you address your concerns. You can schedule an appointment with Dr. Chan by calling 949-824-6457. When you call, please specify that you would like to be seen by Dr. Chan during her virtual Law School hours.

If you are concerned about a life-threatening situation, we encourage you to contact the UCI Police Department at 9-1-1.

For more information on mental health resources, please visit our site: <https://www.law.uci.edu/campus-life/mental-health/>.

COVID-19 POLICIES

Promoting a healthy environment at UCI Law is a collective effort of everyone in our community—students, staff, and faculty. Your individual choices directly affect the well-being of others. All students, staff, and faculty must be familiar with and comply with [UC Irvine’s \(UCI\) campus-wide COVID-19 Policies](#) (the “UCI COVID-19 Policies”), which are intended to mitigate the risk of spreading COVID-19 and help keep our community healthy. These include, among others:

- the [UC COVID-19 Vaccine Policy](#), which requires vaccination and boosters;
- the [UCI Executive Directive on Testing](#);
- the [UCI Executive Directive on Face Coverings](#); and
- the [UCI Daily Symptom Check](#).

UCI has not yet [reinstated its indoor masking requirement](#). If masking becomes a requirement in the Spring 2023 term, please see University (or Law School) policies. **If a face making directive is issued, you must wear an approved face covering at all times in this class. It must cover your nose and mouth.** You are not permitted to eat in class. If you drink in class, you may remove your face covering briefly to sip and then must promptly put it back on.

Students are expected to attend class sessions in person, unless UCI campus-wide public health directives provide otherwise. However, **do not come to this class if you are exhibiting [COVID-19 symptoms](#)**. If you miss a class for this reason, or because you are required to isolate or quarantine under [these guidelines](#), please notify me to make alternative arrangements about what you have missed, as there will be no automatic Zoom recordings of classes. Such notifications are subject to the Honor Code. I will also be happy to answer any questions about the class session you missed.

By coming to this class, you are self-attesting to all others in attendance that you are in compliance with the UCI COVID-19 Policies. These policies may change from time to time to adapt to changing circumstances.

Your conduct in this class is academic conduct. An essential aspect of that conduct is your compliance with the UCI COVID-19 Policies, which is necessary to foster a classroom environment conducive to the academic activity we will engage in this semester. Consequently, noncompliance with any of the UCI COVID-19 Policies or the UC COVID-19 Vaccination Policy, or noncompliance with any request I may make that you comply with one of these policies or leave the classroom due to noncompliance, by any student

attending this class is instructor-prohibited conduct for purposes of Article II, Section 6, of the Honor Code and may lead to disciplinary action under the Honor Code. In addition, noncompliance may subject you to discipline through UCI's Office of Academic Integrity and Student Conduct. Disciplinary action is reportable to the state bar and may adversely affect your ability to be admitted to the practice of law.

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, January 9, 2023, at 10:25-11:55 am. We have two rooms for our class, 4700 and 4750. Please come to 4700 for our first class.*

Date	Topic	Reading Assignment and Exercises
Reading Assignment and Exercises		
Jan 9, 2023 M	Introduction to DR and The Lawyer as Problem Solver	Neg-Med-Arb exercise Menkel-Meadow et. al (text) Ch. 1 pp. 12-33; Ch. 2 pp 43- 57; VSI Negotiation, Ch. 1
Jan 11 W	Key Concepts in Dispute Resolution and Conflict Theory	Text, Menkel-Meadow, et.al Ch. 1, pp. 3-12; 33-42
Jan 16 M	No class	MLK Day—how did Martin Luther King deal with disputes and justice? Optional: Menkel-Meadow, Nelson Mandela and DR (on CANVAS)
Basic Processes of DR		
Jan 18 W	Negotiation I: Theories and Frameworks	Text, Ch. 3, VSI Ch. 2; Negotiation Problem # 1
Jan 23 M	Negotiation II: Skills and	Text, Ch. 4 Negotiation

	Behavior	Problem # 2; VSI Ch. 4
Jan 25 W	Negotiation III Barriers to Agreements and Creative Solutions	VSI 3, 5; Class Exercises
Jan 30 M	Negotiation IV Role of Law; Ethics & Policies	Text, Ch. 5; VSI Ch. 7-8 Negotiation Problem # 3
Feb. 1 W	Mediation I: Introduction Overview, Purposes and Uses	Text, Ch. 6 Scenes From a Mediation (film) Neighborhood Mediation Center
Feb 6 M	Mediation II: Skills; Roles of Mediators, Parties, Lawyers	Text, Ch. 7 Opening Statement Ex.
Feb. 8 W	Mediation III: Ethics, Controversies	Text, Ch. 8 Prosando v. High-Tech (film)
Feb 13 M	Mediation IV: Practicum	Mediation Problem (simulation in class)
Feb 15 W	Arbitration I: Introduction: Concepts and Models Text Ch. 9	
Feb. 20 M	No class	President's Day: How did George Washington and Abraham Lincoln resolve or deal with disputes?
Feb. 22 W	Arbitration II: The Law of Binding Arbitration	Text, Ch. 10, and Distributed cases on Canvas
Feb 27 M	Skills and Ethics of Arbitration III Ch. 11 and CANVAS	
March 1 W	Arbitration IV: Practicum: Drafting and Practice Issues	Distributed problem
March 6- 8:	No class	Spring Review Week
Applications of DR: Process Pluralism		
March 13 M	Hybrids-Public and Complex	Text, Ch. 12, pp. 427-; 448- 474
March 15 W	Hybrids: Private and Other Applications	Text, Ch. 12, pp. 427-447
March 20 M	Multi-Party and Public Disputes	Text, Ch. 13; pp. 475-491 Coalition Ex.
March 22 W	Multi-Party Disputes;	Text., Ch. 13 pp. 491-503:

	Decision Making and Voting Rules	VSI, Ch. 6 Class Exercise
March 27 M	Dispute System Design	Text. Ch. 13 503-515; Class Exercise
March 29 W	Critiques of ADR: Race, Gender, Class and Power Inequalities; Privatization of Justice	Dist. Mat. [Ch 14 of Mediation text, Menkel-Meadow et.al] Class Exercise
April 3 M	ODR	Guest: Colin Rule; Text pp. 438-447; Material on CANVAS
April 5 W	Comparative ADR	Film— <i>Little Injustices</i>
April 10 M	Choosing an Appropriate Process: Clients' Interests	Text. Ch. 14 Short Paper due- Comparative DR and Critiques
April 12 W	Choosing and Evaluating DR Processes: Systemic and Justice Issues	Text, Ch. 14 pp. 528-550
April 17 M	Restorative and Transitional Justice Material	Menkel-Meadow, on CANVAS
April 19 W	Alternatives or NOT? Last class	CANVAS Distributed material
April 24 M	Review class TBD	
Final Examination (Take home)		