

## What Every Law Student Should Know

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Perry Mason. Atticus Finch. Ally McBeal. Lawyers try cases, right? Until you entered law school, you may have shared the common perception that lawyers spend most of their time in the courtroom arguing on behalf of their clients.

Not only do many lawyers never try a case, but in the past several decades, the means for resolving disputes have expanded well beyond traditional adversarial litigation. Alternative dispute resolution, which encompasses a range of processes, has become both widely available and extensively used. In fact, in many states, most litigants must make a mandatory ADR stop along the road to the courtroom.

In recent years, ADR, sometimes called “appropriate dispute resolution,” has become a standard feature of essentially every lawyer’s work. Building on earlier experimentation with ADR in federal courts, the federal Alternative Dispute Resolution Act of 1998 requires federal district courts to “devise and implement” procedures for using ADR in all civil cases. The act also requires all civil litigants to consider using an ADR process. (See the text of the act in the box on page 19.)

State courts have also experimented with ADR for several decades, and all 50 states have implemented court rules providing for some use of ADR processes. Many of these jurisdictions go beyond merely offering the opportunity to use ADR to resolve conflicts, and, in some cases, actually require litigants to try mediation or some other form of ADR.

Contemporary lawyers also encounter mandatory ADR requirements outside the context of court-annexed ADR. Commercial contracts, employment agreements, and real estate contracts commonly require the contracting parties to settle disputes through ADR rather than through formal litigation.

Given the widespread use of ADR, law students entering the profession must have basic knowledge about ADR processes to provide competent representation under professional responsibility rules. But because information about ADR is not always included in the required law school curriculum, as a student, you may need to seek out opportunities to educate yourself.

### What is ADR?

ADR processes have their roots in the dispute resolution systems of non-Western cultures, which often emphasize community healing rather than individual rights. In the United States, the field of labor law has employed ADR concepts for decades to foster workable employment relationships. And in the 1960s, some communities experimented

with ADR in neighborhood justice centers to help solve problems within the local community.

The recent growth of ADR has been prompted primarily by the shortcomings of the adversarial litigation system. In a 1984 address to the ABA, then–Supreme Court Chief Justice Warren Burger acknowledged that while trials are the only way to resolve some disputes, overall, our adversarial legal system is too costly, painful, destructive, and inefficient. Indeed, ADR processes are designed to reduce both cost and trauma to the parties, and to ease the overwhelming dockets most courts have faced in the past several decades.

Aside from the practical concerns of cost and crowded dockets, many ADR proponents envision a transformative approach to resolving disputes. In their view, traditional litigation focuses too much on winning and not enough on problem solving. Further, courts can impose only certain prescribed solutions, mostly involving money. So when a court or jury decides a dispute, the outcome may or may not resolve the underlying issues. In contrast, ADR processes like mediation focus on exploring the parties’ “interests” and allow the parties themselves to craft solutions that advance those interests. Thus, ADR fosters flexible, individually tailored results that achieve joint gain for the parties, rather than a win-lose outcome.

ADR advocates also argue that by providing a forum in which parties can tell their stories, ADR processes allow the parties to be “heard” during the dispute resolution process. Further, these processes emphasize cooperation and openness rather than conflict and secrecy, allowing the parties more control over both the process and the outcome. As a result, they satisfy important psychological needs and achieve better-quality justice.

### **Basic ADR processes**

Early discussions of ADR focused on the idea of the “multi-door courthouse,” where disputing parties would choose from a number of options, including litigation, for resolving their differences. Each dispute would be evaluated early on to determine which dispute resolution method was most appropriate. Relevant factors might include the relationship between the parties, the relative power of the parties, whether the dispute impacted the public or only private parties, and the appropriateness of monetary solutions versus other solutions.

ADR offers basically three types of “doors” into the courthouse: facilitative, evaluative, and adjudicative. Within these categories, a process may be either binding or nonbinding, depending on the parties’ agreement or the particular rule or contract that brought them to the table.

In a *facilitative* process, a neutral third party facilitates communication between the parties to help them arrive at a solution to their problem. Neutrals may not impose their own judgments on the parties or offer any substantive opinions, but instead work to bring the parties to consensus.

The main facilitative process offered in ADR practice is mediation. To some extent, mediation is an extension of the negotiation process that lawyers commonly employ to settle cases but with a designated third-party neutral to facilitate. In facilitative mediation, mediators help the parties identify areas of concern, understand each other's perspective, and create mutually acceptable solutions.

In an *evaluative* process, a third-party neutral evaluates the case and offers a candid assessment of its strengths and weaknesses. This evaluation may occur within the context of evaluative mediation, where it will theoretically help the parties arrive at an agreement. Or, in the context of litigation, a third-party neutral's evaluation can help narrow the dispute and shape the discovery process, possibly encouraging settlement. In this context, the process is called early neutral evaluation or neutral fact finding.

*Adjudicative* processes result in evidence-based decisions made by third-party neutrals outside of court. While adjudicative ADR processes resemble in-court litigation, they can be quicker and cheaper than formal litigation. Also, to the extent they encourage settlement, they offer parties more control over the outcome than formal litigation.

In arbitration, probably the best-known adjudicative ADR process, the parties present evidence and arguments to an impartial third party who makes a decision, much like a judge. Usually, the parties have voluntarily agreed to settle their dispute through arbitration and have agreed to be bound by the arbitrator's decision.

In a summary jury trial, an advisory judge presides over an advisory jury—usually consisting of six jurors—and issues a nonbinding opinion on liability, damages, or both. Similarly, in a mini-trial, counsel for the parties present an abbreviated “best case” to a panel consisting of representatives for each party, neutral third parties, or both, to define the issues and establish a basis for settlement negotiations. The neutral third party may also issue an advisory opinion on the merits of the case.

In a moderated settlement conference, a neutral panel of three lawyers, usually legal experts on the particular issues involved, offers a nonbinding opinion about the case. The opinion shapes the issues and, in theory, encourages the parties to reach a settlement.

Sometimes parties will elect a hybrid process that combines two or more of these options. For instance, in mediation-arbitration, the parties agree to mediate their dispute initially then to arbitrate any unresolved issues, using the same neutral for both.

### **ADR: not only for civil litigation**

ADR processes are not limited to civil litigation. In the criminal arena, some jurisdictions have experimented with the idea of “restorative justice.” Restorative justice programs attempt to address the harm criminal behavior causes by involving both offenders and victims in the response.

For instance, parties might participate in victim-offender mediation, during which the offender hears the victim's story and has the opportunity to better understand the impact

of the offense. A sentence might be imposed through a sentencing circle, during which members of a community discuss the impact of the crime, raise underlying issues, and promote healing. Or offenders might be ordered to make restitution particularly suited to their crimes, allowing them to remedy the damage caused by their actions.

Administrative agency lawyers may engage in ADR through a negotiated rulemaking process. In negotiated rulemaking, government agencies engage in a collaborative process with a variety of stakeholders to formulate new agency rules. Congress authorized this process to encourage parties affected by agency rules to meet, communicate, and cooperate during the process. Critics of the existing adversarial rulemaking process argue that it encourages antagonism and litigation. In contrast—at least in theory—negotiated rulemaking results in more acceptable, substantively superior rules that the affected parties are less likely to resist.

Some jurisdictions have even implemented appellate mediation programs, essentially taking the position that no case is over until it's over. At first glance, it may seem unrealistic to expect a party who won in the district court to agree to mediation on appeal. But several factors encourage even prevailing parties to consider appellate mediation. About 30 percent of cases are overturned on appeal, so every appeal does carry some risk. Further, appeals are expensive, take time, and exacerbate what may already be significant litigation fatigue. Finally, appellate mediation offers the parties, once again, the opportunity to create a better solution than a court can provide.

### **Becoming an ADR expert**

As a lawyer, you will probably be involved in ADR in a representative capacity at some point. But if you are interested in becoming a mediator, an arbitrator, or a neutral evaluator, what should you do?

First, recognize that becoming an ADR neutral for any ADR process requires experience and knowledge. Law students do not usually graduate from law school and immediately become ADR practitioners, even if they have taken ADR courses during law school.

“It’s the classic case of needing the experience to get the job, but needing the job to get the experience,” says Hamline University School of Law Professor Bobbi McAdoo, an ADR specialist and practicing mediator. For the most part, she says, mediators and arbitrators are successful lawyers who have shown dispute resolution excellence to their peers. To prepare for a career as an ADR practitioner, she recommends looking for ways to develop relevant skills in your legal practice, including listening skills, the ability to ask appropriate questions, and creativity in solving problems.

Carolyn Chalmers, an experienced mediator and director of the University of Minnesota Office for Conflict Resolution, agrees that experience is essential. “If you want to mediate or arbitrate cases with the potential for litigation, you need practice experience. Lawyers choose the mediator, and they look in the legal field,” she says. “Even for disputes that are not in litigation or not focused on legal issues, it’s not easy to become a

mediator unless you have significant life experience that will help you in the mediation process.”

Also, as a practicing lawyer, take cases to mediation or arbitration, and get experience resolving them successfully with these processes. “One of the best ways to prepare to be a mediator is to be a good advocate in the mediation process,” McAdoo advises. “You have to show other lawyers that you can move a conversation along toward settlement, take all the parties’ interests into account, and generate good settlement options.”

While particular subject matter expertise is not an absolute requirement for ADR practitioners, experience in the relevant area of law always helps. Generally, the mediator or arbitrator needs to understand the legal issues sufficiently to structure the conversation, understand what litigation will look like if the parties do not resolve the case, and remain credible with the parties.

But you can lay some groundwork for a career in ADR while you are a law student. Consider taking a for-credit course during law school. The most recent ABA Section of Dispute Resolution *Directory of Law School Dispute Resolution Courses and Programs* lists 184 law schools that offer 887 different ADR courses and programs. Most schools offer at least an ADR survey course, and many offer more specialized classes like Arbitration, Mediation, or Negotiation. The directory is online at [adr.uoregon.edu/aba](http://adr.uoregon.edu/aba).

If you face a full class schedule during law school, you can take a continuing legal education course after you graduate. For course information, check with your state or local bar association or CLE providers. The ABA website also lists ADR training providers, as do websites of other major ADR organizations. (See the “Online ADR Resources” box on page 16.)

Also, look for ADR-specific law school competitions. The ABA Law Student Division sponsors yearly a Negotiation Competition and an Arbitration Competition, and the Section of Dispute Resolution sponsors a yearly Representation in Mediation Competition. The Willem C. Vis International Commercial Arbitration Moot competition attracts students from all over the world to events in both Vienna and Hong Kong each year.

Check with your school’s moot court, ADR, or client skills director to see if your school sends teams to these or other ADR competitions. Online dispute resolution competitions are often open to law students as well. For information, visit [www.odr.info](http://www.odr.info).

The Dispute Resolution Section also sponsors the James Boskey ADR Writing Competition. The winning author receives a \$1,000 prize and an invitation to publish in the *Yearbook on Arbitration and Mediation*, published by Penn State Dickinson School of Law. Information about the contest, and other information about how law students can get involved with ADR, is available on the ABA website at [www.abanet.org/dispute/21centuryattorney.html](http://www.abanet.org/dispute/21centuryattorney.html).

Finally, consider volunteering. Many cities have neighborhood justice centers where parties can resolve their disputes inexpensively and without resorting to the courts. Most will accept volunteer mediators who have had some training, which may present a great opportunity to get your feet wet. In some states, conciliation or small claims courts offer mediation programs that provide volunteer opportunities. Check with your local district courts for information. The Equal Employment Opportunity Commission also accepts volunteer mediators and usually offers orientation and some training. And some institutions and schools have peer mediation or ombudsman programs where you might observe or participate in ADR processes.

ADR experts agree that adversarial adjudication serves important purposes, such as generating the rule of law and serving as a last resort when parties themselves cannot resolve their disputes. But ADR is definitely here to stay, as more courts require it and more parties take advantage of the benefits it offers. Law students need to familiarize themselves with basic ADR methods and ideas so they can graduate ready to be competent, knowledgeable professionals.

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## **Collaborative Law**

Collaborative law is a nonadversarial process for solving disputes in which lawyers and their clients agree at the outset to reach a settlement without resorting to litigation. Parties engaged in the collaborative law process participate actively in the discussions and decision making without the involvement of a third-party decision maker. Some family law attorneys have set up practices committed entirely to collaborative law, which they view as promoting dignity and respect for all family members.

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## **Online ADR Resources**

The websites below provide information about ADR training:

- [ABA Section of Dispute Resolution](#)
- [American Arbitration Association](#)
- [Association for Conflict Resolution](#)
- [Mediation Training Institute International](#)

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## **Alternative Dispute Resolution Act of 1998**

Below is the text of the ADR Act of 1998, 28 U.S.C. § 651–58

## **SEC. 2. FINDINGS AND DECLARATION OF POLICY.**

Congress finds that—

- (1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;
- (2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and
- (3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.