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## Why Take ADR Courses In Law School

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You're a second or third-year law student wondering if you should take an Alternative Dispute Resolution ("ADR") course next semester: a good question that raises many concerns. Would substantive law courses be a smarter choice? What might a prospective employer like? What will make you a better lawyer? Get you a job? Why take ADR?

Well, I'd like to encourage you to put either a Negotiation, Mediation Advocacy or Mediation course at the top of your preference list before departing those hallowed halls. These courses delve into "consensual" resolution: that is, processes where participants negotiate and control the resolution of their own dispute, sometimes with the help of an outsider, rather than having an outsider decide the matter for them, as in a trial. While these courses cover many other aspects of these processes, they all stress the centrality of negotiation know-how. In Negotiation, you'll study the dynamics and skills for bargaining with opposing counsel either with or without your clients in tow; in Mediation Advocacy, you'll explore counsel and client roles in negotiating with opponents under the helpful eye of a mediator; and, in Mediation courses, you'll develop understanding of participants' negotiating behavior and how mediator's use negotiation skills to help parties settle differences at the mediation table.

You might wonder why I'm not including courses in Arbitration: a seminal ADR process. We'll get to that later. (*See Post Script below*)

### **Practical Reasons to Consider Negotiation, Mediation Advocacy and Mediation.**

Before discussing the particular skills these courses impart, let's consider a number of practical reasons to take them.

**First: You Might Land Yourself an ADR Job.** Taking these courses will provide the background you need to secure a position in the ADR field.

- a. **ADR Administrative Jobs:** Consensual forms of ADR have flourished only in the last 20 years and the field is still growing. So ADR jobs are increasing in number although gradually. Newer lawyers might qualify for jobs as administrators in ADR programs for the courts, government agencies, Bar Associations, non-profits dealing in ADR, or ADR Providers (outfits administering ADR for private parties). In these positions, lawyers develop, evaluate, promote or monitor ADR use for the organization. Getting an internship during law school in your targeted organization can be helpful in landing such spots.
- b. **Law Firms:** While still relatively new, collaborative law firms are beginning to develop. In these practices, clients agree that the attorney will limit representation to settlement efforts in negotiation or mediation advocacy. If settlement efforts fail, counsel from outside the collaborative firm handles the litigation. Traditional larger firms have also begun to develop Dispute Resolution Departments that include litigators and other lawyers who can serve as sophisticated settlement advocates. Associate positions in firms that promote settlement efforts may interest you.
- c. **Corporations:** Generally speaking, practice in traditional areas of law for a period of time will give you a superior edge in landing most corporate ADR-related jobs. Many corporations, in efforts to reign in legal expenses and avoid getting mired in the business of litigation, have developed conflict management programs to resolve disputes early and efficiently. In these programs, resolution options are all evaluated given the case and business needs but multi-step use of negotiation and mediation

often rises to the top as resolution options of first choice. Mediation is fast, efficient (often having settlement rates of 80-90% in commercial disputes), can preserve relationships so critical to business growth, and doesn't foreclose litigation, if settlement efforts fail. As an in-house lawyer, with some law practice experience under your belt, you might be asked to develop and monitor a corporate system that uses ADR to address streams of cases or those with significant financial ramifications. You might be asked to hire and supervise outside settlement counsel or limit the number of outside firms to those who are skillful advocates in negotiation and mediation. By taking these courses, you'll have an edge in understanding how negotiation and mediation operate so you can tackle these tasks knowledgeably.

You might also qualify for a position as an Ombudsperson in a corporation. Ombuds help isolate dispute areas in organizations to help eradicate the causes of conflict. They also work with disputing employees, constituents or customers to resolve problems consensually before they escalate. One often finds Ombuds in Human Resource Departments in companies; many are lawyers familiar with ADR. Their numbers are growing in government offices, courts, universities and hospitals. Typically, but not always, lawyers already employed by such organization get the position given their knowledge of the institution's culture.

- d. Serving as a Mediator:** Of course, many students would like to be a mediator. But, some reality testing is in order. The administrative jobs rarely prepare you to be a mediator although they can provide a career path for a lawyer. Typically, if you want a career as a mediator in the lucrative commercial realm, you need to practice in an area of substantive law for a number of years while developing mediation skills and your reputation. One can develop mediator skills by volunteering in organizations that train and use volunteer mediators such as courts or community dispute resolution centers. Being a member of a Bar Association ADR Section also keeps one up-to-date on this rapidly developing field and provides networking opportunities. Seeking mentoring opportunities with one of the many seasoned lawyers who have opted into mediator careers in recent years may also help develop your skills. But, if you want to get paid as a mediator, or be hired by one of the leading ADR providers to perform mediation for their clients, you need to be able to market your expertise, your mediation know-how and your reputation. While some may have jumped from law school to being a mediator in the earlier development of this field in the 1990s, it's more difficult to do that now that the field has grown beyond its infancy.

**Second: You Are Likely To Be Propelled into Consensual ADR.** Even if you're not directly involved in an ADR practice, you'll probably be thrust into participation in mediation. Increasing emphasis on institutionalizing mediation in courts, government halls and companies has produced a greater need for familiarity with mediation and its negotiation underpinnings. Your client's case is likely to be sent to court-related mediation before trial by judges in most federal and many state trial courts. Appellate courts are also using mediation. Many government administrative agencies have developed mediation programs that must be exhausted before cases can proceed to the adjudicative hearing level. In a firm, at a client's initiative, you might also find yourself on the settlement/mediation team for a major case while a separate team of litigators in the firm assumes adversarial trial duties: what is known as a "dual track" process. Similarly, as in-house counsel, you may be thrust into the primary seat as settlement counsel or mediation advocate in any number of cases.

**Third: Negotiation Will Be a Daily Occurrence in Your Law Practice.** You'll use negotiation, rather than adversarial advocacy, during most of your waking hours in every type of law practice. Transactional lawyers who craft deals use negotiation continually but so do public interest lawyers, government attorneys and litigators. The number of cases that go through trial in federal or state courts hovers around 5%, give or take a few percentage points. The vast bulk of litigated matters wind-up in settlement conferences or a court mediation program; or, something happens during litigation to prompt one party to initiate serious settlement talks, such as losing an important motion. While more arbitrations proceed to

final award than do court trials, many arbitrations also settle. So, it's highly likely you'll reach the negotiation or mediation table during litigation or arbitration. You will also be negotiating continually with adversaries over timing, meetings, exchange of materials, discovery procedures, and early settlement forays. Beyond your adversaries, you'll use your negotiation skills with your colleagues, with team members, with managers, with legal consultants, with suppliers of office services, with sub-ordinates and with your own clients as you juggle competing client demands and deal with the increasing business aspects of law practice. You can't help but do better with negotiation training.

**Fourth: Professional Ethical Obligations May Demand that You Understand Consensual ADR.** As a consequence of court efforts to increase mediation use, a movement to compel or encourage lawyers to advise clients about resolution options other than litigation has arisen. Today, you may have to comply with a state ethics code provision or a court rule that requires you to advise your client about all available resolution options. In some states, Bar Association creeds encourage lawyers to counsel clients on the availability of consensual processes when discussing resolution paths. Familiarity with consensual processes and their suitability to different cases will enhance such counseling and help you avoid negative repercussions or potential malpractice claims by your clients from failure to comply with these counseling requirements thoroughly.

**Fifth: You'll Get a Taste of Actual Practice while Developing Reflective Lawyering Habits.** These three courses tend to be structured as "experiential" learning in most American law schools. You study legal theory and apply it to practice settings by representing live clients or participating in role-play simulations in small group settings. Discussion of your experiences in the seminar components amplifies your learning. This "experiential" learning can enhance your readiness to enter practice when you graduate by immersing you in the inductive nature of law practice. Practice is not as neat and tidy as appellate case law which dominates so many law school courses and emphasizes substantive law, previously articulated by the courts. In contrast, practice entails messy facts, equivocal case law, and idiosyncratic clients with unique sets of needs. In practice, one needs to shape and find a solution as one integrates legal research and analysis with facts and the practical reality of undetermined outcomes, limited client resources and your clients' needs and objectives.

To enhance that experiential piece, these courses generally require periodic or weekly journals where you reflect on your practice and its relation to theory. Such reflection can highlight your own strengths and weaknesses so you can work on them. It also develops a reflective habit of analyzing what occurred so you can improve performance the next time around. Hopefully that habit will carry over to your professional life and help you continually grow and develop.

### **Negotiation Skills**

You could argue that most clinically-oriented courses, including Arbitration or Trial Advocacy, will provide experiential learning and reflective opportunities, and you'd be right. They're all valuable and you should consider taking any number of them, especially adversarial advocacy courses. (*See Post Script.*) But Negotiation, Mediation Advocacy or Mediation will give you a certain edge, as follows.

### **Familiarity with Negotiation Approaches**

How do you view negotiation? Many lawyers think it's a seat of the pants process with little preparation where you get the other side to give you what you want, any which way you can. This competitive and adversarial approach envisions a win-lose battle that's often unproductive. In fact, negotiation is a far more complicated process and demands a different mind set that recognizes the inherent tension in negotiation: you must engage the other side in order to get to agreement while both sides are in a seeming struggle to achieve apparently conflicting objectives. That tension demands more subtlety than pushing the other into submission.

So exposure to negotiation theory and practice will help you understand “when to hold ‘em,” “when to fold ‘em” and when and how to develop other feasible options and approaches beyond just holding out or giving in. These courses stress the collaborative mode of negotiation or mutual gains bargaining popularized by Fisher and Ury in *Getting to Yes*. Its fundamental concepts stress objective standards, creativity, option development, respect for opponents and satisfying parties’ genuine underlying interests rather than their positions. Such exposure will expand your repertoire and allow you to negotiate with agility. You’ll appreciate varying approaches people take to negotiation, discover ways to lessen competitive tendencies, become more conscious of options you can use rather than relying on raw intuition, appreciate the significant human elements impacting negotiation success, and learn the value of planning. As you become familiar with the broad brush approaches, you’ll be enhancing the key skills below.

### **a. Expanded Communication Skills**

In adversarial settings, assertion skills dominate: lawyers use logic, well-developed statement and presentation skills, tightly orchestrated cross-examination questions, and tools to connect with the trier-of-fact, such as compelling language, analogies and themes, to win the day. But when you negotiate, an additional set of communication tools comes into play along with asserting. Those skills focus on enhancing dialogue to solve the problem. It’s usually a challenge for lawyers to move from assertive statements to a wider band of communication skills. So negotiators learn to use better listening skills which includes confirming understanding of the other side’s statements. They use open-ended questioning rather than restricted cross-examination formats to understand and dig out relevant information. They focus on body language and other signals embedded in communications that can provide information indirectly. They also refine assertion skills by ratcheting down the tone and format of statements to express needs compellingly without rancor. So negotiation will complement any communication skills learned in adversarial settings. But beyond improving your negotiating ability in disputes, these skills will assist you in conducting your daily practice interactions including interviewing clients, unearthing their real needs and interests, advising them of your evaluations, enlarging their view of solution potential, calming them down, and in a host of other ways both professionally and personally.

### **b. Enhanced Persuasive Skills**

The persuasion studied in most courses emphasizes logical rational analysis. Appellate judges apply it in every case based on the lawyers’ logical presentations. Needed in negotiation? By all means. But persuasion to induce another to make a deal requires more. It includes your credibility, command of the subject, astute use of reasonable demands, varied questioning, and relationship building with the other side. We also persuade by showing our willingness to be persuaded: by meeting the other’s needs and concerns and exploring a variety of options that might satisfy both entities rather than only pushing our agenda. And some psychological insights come into play about framing our requirements and anticipating likely reactions so we can make our offers more acceptable. While adversarial persuasion involves many of these tools, they are used to convince an outsider that you’re right. Negotiation persuasion seeks to embrace your opponent, from whom you want something for yourself, and requires persuasive approaches we ordinarily don’t consider.

### **c. Appreciation of the Role of Perceptions**

Every trial lawyer knows that perception plays a role in the court room: it’s not just about facts. Trial advocacy aims, in part, to shift the judge or juries’ perceptions in your favor. In negotiation, we also deal with perception change efforts since negotiators, like everyone else, bring misperceptions to the negotiation table. They make assumptions, they suffer from partial or selective perception, and they tend to view the opposing side with suspicion. So, we seek to amplify those perceptions to remove the negative conclusions the other side draws from their misperceptions which impede willingness to find solutions.

We clarify our intent that may have been misperceived; we demonstrate we're not just competing which they might have assumed; and, we suggest solutions to demonstrate regard for their concerns as well as our own. We explore hypothetical outcomes to induce a broader view of settlement potential. Even in making offers, we account for perception barriers in the way we state offers and use rationales to cast new light on their justifiability. We recognize that the way we use actual leverage or power can alter the other's perceptions toward or against us. Exploring these concepts underscores the important role that perceptual awareness plays in negotiation success.

#### **d. Appreciation of the Human Dynamic**

One can't effectively negotiate or help orchestrate it as a mediator without recognizing the human emotions at play in disputes. Emotions greatly affect receptivity to settlement proposals. Anger at past events, negative reactions to offers deemed insulting, absence of control over a situation or perceived lack of respect, attention or appreciation can derail deals. On the other hand, creating a positive emotional environment by building trust, building relationships across the table, and acknowledging the other's emotional state can alleviate some of the negative feelings in negotiation. These courses will highlight the need to consider the human element whenever you deal with clients or others in conflict.

#### **e. Expanded Problem Solving Ability**

Many lawyers went to law school to help people solve problems. Then, the adversarial adjudicatory system gets ingrained in their blood. That system and the rule of law it's built upon are still the best route to justice I know, when you can't settle matters. But, to function well as a twenty-first century lawyer, you need to complement your adversarial skills with problem solving abilities that support the mutual search for solutions when conflict exists. The negotiation skills you'll garner in the consensual ADR courses will prepare you to engage in collaborative problem-solving whenever possible and apply many of its tenets and skills even in extremely competitive situations.

While I've only touched on the key benefits of gaining negotiation training by enrolling in one of the consensual ADR courses, I hope I've helped you appreciate the need to treat those elective courses as part of your personnel core curriculum. Rounding out adversarial advocacy courses with vital settlement skills will pay vast dividends in every area of law practice despite your chosen field. You'll be more confident and prepared for the challenges ahead and more successful as you join us in the near future.

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#### **Post Script:**

I recommend that you do take an arbitration course but want to stress that the skills you'll learn are quite different from those emphasized in the consensual ADR courses.

Arbitration is a win-lose adversarial process where parties select outsiders to the dispute (arbitrators) to decide the matter and issue a binding award after a private trial on the merits. Lawyers make openings, examine and cross examine witnesses, present documentary evidence and brief legal points. In fact, anecdotal, but mounting, evidence suggests that lawyers have begun to over-judicialize arbitration. They

have increased its costs and time frames by using too many litigation-like maneuvers. Consequently, many corporate clients prefer to specify litigation as their adjudicatory route since arbitration is so costly and has fewer procedural protections than litigation with its right of appeal and evidentiary protections.

Nonetheless, many existing contracts demand arbitration. Agreeing to arbitrate disputes that may arise in broader contractual agreements is the primary route into the process. And arbitration is widely used in many fields as a matter of legal culture, such as securities, construction, labor and maritime, to name but a few. It's also the preferred resolution path in international disputes between parties from different nations and a necessity in our global environment to avoid national courts with varying judicial approaches. Finally, every time you use consensual ADR, you must evaluate what your alternatives to settlement are: if you can't settle, what can you achieve in arbitration or in litigation. Assessing settlement alternatives affects many aspects of your negotiation strategy in all consensual processes. So by taking arbitration courses, you'll be better prepared to negotiate effectively.

Just be sure to evaluate what materials are covered in the arbitration course you're considering. Does it stress the dizzying array of substantive law, procedural quagmires, provider rules and treaties in arbitration practice? Or, does it emphasize the skills of arbitration process and procedure, or does it cover a bit of both? If it doesn't focus on any skills development, take the course to increase command of arbitration since it's so prolific. But also take a Trial Advocacy course to get those adversarial advocacy approaches under your belt. You'll need them for the times you do battle or when you must assess the likely chances of succeeding in those battles to inform your negotiation strategy.