

# LAWYER AS PROBLEM SOLVER: AN EXERCISE IN DRAFTING AN ADR CLAUSE

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Title: An Exercise in Drafting an ADR Clause

Description: This exercise is assigned in the ADR survey course as 35% of the course grade. To do well, the student must use problem-solving theory to identify the ADR process most appropriate for a hypothetical client. They must focus on the goals, needs and interests of his or her client and the other party. Further, this assignment requires that the student apply to a specific situation, his or her understanding of client's needs, the theory of the various ADR processes, the state of ADR practice, the law governing these processes, and the ethical issues likely to arise and the ethical standards available.

Alternatively, the assignment can be used to introduce beginning students to the various forms of ADR and their salient characteristics by reducing the scope of the assignment.

Please send comments or feedback on this exercise to [sschmitz@siu.edu](mailto:sschmitz@siu.edu).

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## TEACHING NOTES

The purposes of this assignment are:

focus the students on task of advising a client about ADR, including understanding the goals, needs and interests of the client and the other parties involved in a dispute or a transaction;

enhance their understanding of the forms of ADR processes most frequently used, how they work, and the advantages and disadvantages of each;

apply, to a specific situation, their knowledge of the theory of one or more ADR process, the law and ethics related to ADR;

acquaint the students with some of the ADR providers, rules commonly used by practitioners, and guides available in the ADR field;

and gain skill in drafting ADR clauses.\*

This task is assigned during the survey course, after we have studied all processes but arbitration. It is due thirty days later, by which time we have completed most of the study of arbitration. The survey text describes most of the common ADR processes. I lecture on several others. I also spend about one class, explicitly on the subject of drafting ADR clauses. Through the library reserve or the Internet, I make available materials that provide guides to drafting clauses, model clauses, issues to consider, and rules of the major ADR providers. I also invite students to discuss problems with me while they work on this project.

I have designed nine client scenarios, four of which are attached here. By distributing them randomly, I ensure that several students have each client. This permits students to discuss their problems with me, but remain anonymous when submitting the paper.

It is extremely helpful, if not essential, that students read *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, by Frank E.A. Sander and Stephen B. Goldberg, 10 NEGOTIATION J. 49 (1994).

Comments: I find that this is the single best assignment or activity of the semester. The students who come to me with questions have been engaging in the type of thought expected of practitioners. Those who do well have mastered all aspects

of the assignment. Even those who do not do well have considered the role of the lawyer in advising clients about ADR and in drafting documents, using an ADR process.

\*Alternatively, the assignment can be used to introduce students to ADR by requiring that students draft a clause and complete Sections I and II of the assignment.

The objectives would then be:

focus the students on task of advising a client about ADR, including understanding the goals, needs and interests of the client and the other parties involved in a dispute or a transaction;

enhance their understanding of the forms of ADR processes most frequently used and the advantages and disadvantages of each;

apply, to a specific situation, their knowledge of the theory of one or more ADR process related to ADR and discuss the circumstances under which the ADR clause may be ineffective;

and gain skill in drafting ADR clauses.

Appropriate adjustments need to be made in length of the paper and grading. The assignment could be made prior to study of the various ADR processes so long as materials describing the various ADR processes and the Sander-Goldberg article are made available.

SOUTHERN ILLINOIS UNIVERSITY SCHOOL OF LAW  
ALTERNATIVE DISPUTE RESOLUTION  
ASSIGNMENT: ADR Clause Drafting

In this assignment, you will draft a dispute resolution clause for your client and write a defense of the clause drafted for me. You will receive a fact pattern in October, describing your client and the type of document for which the clause is being drafted. Your assignment will be twofold:

- (1) draft the clause for that document and
- (2) defend your work product.

For example, you might represent a landlord and draft an ADR clause to be placed in a lease for residential dwellings. (In this example, you would not draft the lease, only the paragraph(s) relating to dispute resolution.)

The ADR clause must be one that you draft, not one copied or borrowed from guidebooks. However, you should consult guidebooks for models. For model clauses, go to <<http://www.adr.org>> for American Arbitration Association (AAA) material or to <<http://www.cpradr.org>> for CPR materials. Further, the AAA site has a guide for drafting clauses and their rules of procedure for mediations and arbitrations.

Additional helpful material may be found on reserve; helpful materials are also available in the ADR Clinic and will not circulate. See TWEN for excerpts of past student work as examples of quality work. If you refer in your clause to the rules of an ADR service, be sure you have read the rules; discuss in your defense what the rules provide and why the rules are appropriate to your client's situation.

You do not need to do any research concerning the substantive law. Assume that you are not bound by any statute or uniform act concerning a "default" dispute resolution process for any area of the law (e.g., partnerships, employment law).

This assignment is to be completed independently (no collaboration) and submitted anonymously. Part one, the clause, should be no longer than two pages. Part two, the defense, should be no longer than ten pages. Both should be typewritten or computer-generated, submitted in paper form, double-spaced, with standard formatting, 12 point font, one inch margins. Write clearly and in a style appropriate to a formal paper, using standard English grammar, punctuation and spelling. Number pages -- hand numbering is OK. Correct typographical (or computer) errors.

An explanation of the grading criteria appears below. **Submit the paper to the appropriate box in Room 114 by the deadline. The paper is worth 35% of your grade.**

## GRADING CRITERIA AND SUGGESTED ORGANIZATION

Some issues and topics you will want to address are listed here. Note that not all issues apply to each situation and there may be other issues you need to address. Do not assume that I understand why you wrote what you did in your clause. Explain your reasoning to me in your defense. I have listed the issues and topics below in the order I would like them to appear, and I indicate the number of points to be assigned to each section.

### **3 points: Section I: The Problem**

Describe your client and the other parties:

who are they and what are their goals, interests and needs in regard to resolving disputes?

What types of disputes are likely to arise under the relationship?

What do they need in a dispute resolution process?

### **3 points: Section II: The Choices**

Describe the ADR processes usually available and the advantages and disadvantages of the process(es) chosen as well as those not chosen? (You may discuss the process in categories such as the adjudicative processes, the facilitative processes, etc.)

Why did you and your client make the choices you did?

In your discussion, use the Sander-Goldberg matrix from the textbook.

### **7 points: Section III: The Process**

Explain how the process will work:

in regard to time, location, costs?

what rules of evidence, procedure, and decision apply?

what style of mediation or arbitration will be used?

are processes voluntary or mandatory, advisory or binding?

what or who initiates and ends the process? If using a series of processes, who or what initiates and ends each step?

what disputes will be subject to the agreement?

Who participates in the processes, what authority should they have, extent of participation?

What if anything is the role of lawyers in the process?

Describe the neutral's style, training, qualifications, selection method, fees?

What remedies, including interim relief, are available? What discovery, if any?

Other issues?

### **7 points: Section IV: The Law**

Describe the present state of the law as to the following and if the law does not provide the protections you desire for your client, how have you provided those protections?

enforceability of agreements to use ADR?

confidentiality?

enforcement of awards or agreements?

reviewability?

qualifications of neutrals?

If you chose arbitration, what standard of decision, what rules of procedure and evidence will govern?

### **3 points: Section V: Ethics**

Describe the present state of ethical norms concerning neutrals and lawyers in ADR? If there are none, what standards do you want to govern the neutral and/or the lawyer?

What ethical issues might arise in the process chosen and how have you provided for them to be resolved?

Other ethical issues?

**12 points:** choice of process, thoroughness of drafting, defense well-written, exceptional understanding.

## COMMERCIAL LEASE

1. You represent a Carl Thornborough, a commercial tenant, about to lease space in a strip mall for a jewelry store. (Assume the landlord does not use a standard lease form and that you can negotiate the terms.) Your client and Delores Reno, the landlord, have agreed on a five-year lease, which serves your client well. From past experience, Thornborough knows to expect some problems with any building: roof leaks, repairs to the building, painting the outside as needed, etc. For security reasons, Thornborough wants to restrict access to the store when it is closed and he will handle routine cleaning duties. Reno has agreed that Thornborough may install an elaborate security system that his insurance company requires. Thornborough will need the system serviced and updated occasionally. Thornborough manages the store, works in it daily, and employs several other people.

This is a mid-sized town and your client is concerned about competition from the mega-stores at the big malls. Your client's store is locally owned and well-established in the community, with many long-time customers. The new strip mall location is a desirable location and your client is happy to move because he believes the better location will increase profits. The new location should keep old customers coming and attract new ones. Currently, all spaces are filled with tenants that compliment Thornborough's business. He has a few concerns. He wants to ensure that the strip mall and the parking lot are well-maintained. Reno has promised to maintain the parking lot, which she also owns and manages, in good repair. Thornborough also wants to be sure that shops that move into the mall later will compliment his business. As noted above, he has special security needs.

Thornborough and Reno know each other as fellow small businesspersons and as fellow members of the Chamber of Commerce. Reno urged Thornborough to make this move. Your client has been happy so far but wants to prevent any small problems that may arise from becoming big ones. He cannot afford to lose time from his business while he works out problems and he does not want a bad image among his customers or within the business community.

## SMALL BUSINESS PARTNERS

2. Your client is Anne Kennedy, who is about to enter into a partnership, running an automobile repair business with her brother-in-law, Alex Levi. Kennedy has asked you to include in the partnership agreement a plan for resolving any problems that may arise. (Do not concern yourself with the Uniform Partnership Agreement or any state versions; assume such are not binding on this situation.) Kennedy has a great deal of respect for Levi's talent as a mechanic and especially for his ability to communicate with customers. He has good rapport with customers and has great ideas for advertising and attracting more customers. Kennedy considers herself to be a quality mechanic and a very good financial planner. She knows how to run a tight financial ship. Between them, she thinks they will compliment each other and run a good business. But she is aware that their differences may lead to disagreements on how to conduct the business. She is also concerned that the family relationship may interfere with business interests.

The soon-to-be partners have agreed to a plan for initial investment in the business and for a profit and loss distribution plan. They have a plan in the event the business closes. What Kennedy now wants from you is a method of working out problems before they wind up in court or ruin the business. The repair shop is located in a medium-sized city and the partners will depend on a steady, loyal customer base in order to succeed. Since the two of them will handle all of the work, both the repairs and the business aspects of the shop, they are eager to conserve their time and money for the good of the business, and not for costly litigation.

## VENDOR CONTRACT: TWO SMALL BUSINESSES

3. Your client is the Smith, Saxbe, and Barr (SSB) engineering firm that is about to sign a service agreement with a copy machine provider. The SSB engineering firm needs copiers for its blue prints and mechanical drawings and other specialty products. The copiers must copy very large drawings and must capture very fine detail. Copiers are in use daily. When a copier of this type breaks down, the copiers at Kinko's (or other commercial copy services) are not an adequate substitute. SSB often uses copiers throughout the night to be ready to meet bidding deadlines.

SSB sought out a new copier machine service after it had too many problems with the old service: machines were down for days before service was provided, service was provided only during regular business hours, and no adequate loaner machines were available. The new service, Clark Copies, has promised service within 24 hours, night or day. It promises that it has most parts readily available and will provide an equivalent loaner if a machine has been down longer than 24 hours. All of these promises are in the contract but SSB wants to further ensure that any disagreements over service are quickly resolved.

SSB has never before worked with Clark, but received good recommendations about the service. There are a couple of other copier machine repair services in the city that could accommodate SSB if Clark does not work out. However, SSB would like to find a dependable service and keep it. Neither Clark nor SSB have the time, resources, or energy to spend on dispute resolution; both need to spend their energies on the businesses.

## CONSUMER DISPUTE RESOLUTION SERVICE

4. You have been retained by the executive director of the Chamber of Commerce for Anycounty, a group of merchants who are quite invested in their businesses and in the economic development of the area. The merchants wish to improve the image of business in the community and want to offer a dispute resolution program to their customers. They envision a program in which a customer who is unhappy with a service or product can seek a resolution through the program. They have not yet determined what the mechanism for resolution will be or how it will work. They certainly want to make participation optional for customers. They believe that if the customer wants to use the service, the merchant should be required to participate.

Most of the businesses are small businesses with limited funds, energy, and time to engage in protracted litigation or dispute resolution. They do not want to involve attorneys if they can avoid it, because attorneys are costly and escalate the level of the dispute. They do want some forum for resolution because they recognize that keeping customers happy is key to their success and they think that a dispute resolution program will be one way to keep customers happy.

The Chamber wants you to design a clause that the members will place in all sales agreements that will set out the terms of the program if the customer elects it.