

Alternative Dispute Resolution, Law 860
Professor Stephen Ware, Fall 2019

Learning Outcomes. This is an “experiential course.” This course integrates legal doctrine and theory, professional skills, and legal ethics, while enabling students to perform several important professional skills on multiple occasions throughout the semester. Successfully completing this course will advance students’ knowledge about the law and concepts of Alternative Dispute Resolution—especially the arbitration, negotiation, and mediation of disputes. Students will have many opportunities to use this knowledge in performing a wide variety of skills, including negotiation, mediation, drafting, legal analysis and reasoning, legal research, problem-solving, and written and oral communication—all in an environment designed to heighten students’ awareness of professional and ethical responsibilities to clients and the legal system. Students will also have many opportunities for written and oral self-evaluation, with an eye toward continuously improving their skills.

Basics. The required book is a Concise Hornbook, STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION (3d ed. West 2016). You may use the paper version of this book, or access it electronically. To access it electronically, create an account with West Academic at <https://subscription.westacademic.com/> using your KU email and a password you choose. Once signed in, the book will be available at <https://subscription.westacademic.com/Book/Detail/24933> from anywhere. Although I believe electronic access will be costless and reliable throughout the semester, no guarantees.

You are responsible for doing the reading listed on this syllabus and for coming to class prepared to discuss the reading. Preparation for class and participation during class are crucial in this course. Your classroom performance throughout the semester counts for 20% of your grade in the course.

This course has no exam. Instead, it has graded exercises and written assignments related to these exercises. Graded exercises and related written assignments count for 80% of your grade in the course. The scheduling, format, and grading of the exercises is explained on the following pages. For Honor Code purposes, a graded exercise is like an exam, so it is your responsibility to avoid receiving any help from anyone except as explicitly authorized by my instructions for that exercise.

Graded exercises and deadlines. Failure to participate in an exercise (for any reason) results in no points for that exercise. Arriving late to class (for any reason) on the day of an exercise may prevent participation in the exercise and the related written assignment.

In calculating final grades for this course, I will not consider each student’s lowest exercise score. So missing one exercise (and thus getting no points for it), in some sense, does not hurt your final grade. Nevertheless, a student who misses an exercise has the option of writing a paper, on an ADR topic of my choosing, as a make-up. The paper must be at least 5 pages,

single-spaced, with one-inch margins and at least 30 footnotes. Although the make-up paper has as many points available as the missed exercise, I intend that the amount of work for the paper, and the rigor of its grading, will discourage students from missing exercises. Other than this make-up procedure, you must complete all exercises and written assignments on time to receive any credit. Only your initial submission will be graded; any follow-up will be for learning, not grading. I may show what you submit to the entire class so please consider that lack of privacy in deciding what to send me.

Classroom performance. Should law professors use class time to lecture or to question students? I believe some time devoted to lecture may be appropriate because lecturing can be an efficient way to convey information from someone who has it to someone who needs it. But you should not need to acquire much information during class. You can acquire nearly all the relevant information before class by doing the assigned reading, thinking about it, and discussing it with your classmates. In short, you should come to each class knowing the law we will discuss in that class. You should know what the statutes say and what the courts have held.

If students know all this before class starts, then what is the purpose of our class time? One purpose is simply to test whether you have learned before class what you should have learned. If the professor asks straightforward, factual questions about the reading and you have trouble answering quickly and confidently then you are receiving feedback suggesting that your class preparation or your ability to speak under pressure is deficient. Either way, you benefit from getting that feedback throughout the semester, rather than learning later about the deficiencies. Of course, it is not only questions directed to you personally that give you feedback. After each question directed to one of your classmates, you should think about how you would answer it and compare the answer you would have given to the answer your classmate gave. In many good law school classes, much of the learning occurs through this process.

Another very important purpose of class time is to give you opportunities to “learn by doing.” We lawyers are often good at learning by reading and that is good because many lawyers do a lot of reading for their jobs. But reading alone is not sufficient preparation for the practice of law. Nearly all lawyers’ careers require them to engage in effective communication about the law. While *written* communication about the law is a large part of many lawyers’ jobs, so is *spoken* communication about the law.

During class, I may call on students who have not raised their hands, as well as students who have. Your classroom performance grade is based on the quantity and quality of both forms of participation. I want you to raise your hand and voluntarily contribute to class discussion because I believe doing this is good training for the practice of law, and because class discussion tends to be better when it includes many viewpoints. So the classroom performance part of the grade rewards students who frequently raise their hands and say things that contribute to the education of the class. I generally try to ensure that every student makes many contributions to the class discussion over the course of the semester, so students who raise their hands less frequently than their classmates are more likely to be called on when their hands are not raised.

If you are unable to prepare for a session of our class, better for you to tell me ahead of class than to skip the class or risk being called on. If you ask ahead of class for a pass that day, I will grant it if your classroom performance throughout the semester has been adequate. By contrast, if you have gone a week without contributing to class discussion then you should not be asking me for a pass. If you have gone a week without contributing to class discussion and are unable to prepare for a particular class, then you are not handling the course appropriately, and should contact me to discuss solutions. If you come to class without previously asking me for a pass then you are representing to me and your classmates that you are prepared and ready to contribute. If I call on you in class and you, at that point, ask for a pass or say that you are unprepared then your grade will suffer and your reputation for honesty will be jeopardized.

I recognize that many students find law school classes stressful if classroom performance is graded and the professor may call on any student at any time. If you find this sort of classroom environment stressful then I encourage you to reconsider your preparation for class. If you have prepared well for class then you have anticipated the issues raised by my questions and are ready to use the “book learning” you did before class. That said, even well-prepared students sometimes find speaking in class somewhat stressful. Similarly, many lawyers find aspects of their jobs, including speaking to large audiences, stressful. Compared to most types of law practice, the law school classroom is a relatively safe, low-stakes environment in which to develop important professional skills. Please get the most out of it, rather than shying away from it. I am here to help you with that. If you ever find me demanding or critical, please know that I am trying to help you develop important professional skills.

Computers and other electronics in class. You may use a computer in class but only for working on this course. Any other use of your computer during class is prohibited. And I reserve the right to declare some of our class time “computer-off periods.” Please silence computers, phones, and any other electronic devices you bring to class. Audio or video recording of class is prohibited without my written permission.

Miscellaneous. If you have a disability for which you intend to request a classroom or exam accommodation, you may contact the Assistant Dean for Academic and Student Affairs, Leah Terranova, at leaht@ku.edu or 785-864-4357.

I like to have lunch with students. We can go across the street to the DeBruce Center and, within limits, the school will buy our lunches. To avoid crowds, I prefer to go at 11:45 or 12:45. I find that these lunches work best with groups of two or three students at a time. If you would like to do this, please send me an email suggesting a day or two that works for all the students in the group and please copy the other student(s) on that email message.

My office is Room 414C, my email is ware@ku.edu and my phone number is 785-864-9209. Please do not hesitate to contact me about this course or anything else.

Exercises

At the start of the semester, you will do arbitration exercises. These exercises may involve research, analysis, interviewing, counseling, and drafting. I will grade them according to criteria found on the instructions for each individual exercise.

For most of the semester, you will do negotiation and mediation exercises. In these exercises, you will play a role in a hypothetical situation. Participants in the exercise will receive a sheet of paper with hypothetical facts. In some exercises, all participants receive the same fact sheet. In other exercises, students in one role in the exercise get a different set of confidential facts than students in another role. Each student can choose whether to keep any or all of these facts confidential. During an exercise, you may not communicate with anyone other than the student(s) with whom you are doing the exercise. You must be especially careful not to overhear other students doing the same exercise. For Honor Code purposes, the exercises are like exams.

After each negotiation and mediation exercise, your assignment will include completing a written summary of the exercise. Instructions for the summaries are on the following page.

I will grade your negotiation or mediation exercise based on your written summary and the result of the exercise. For most exercises, a maximum of six points is possible: three for the summary and three for the result of the exercise. The “result of the exercise” is whether you reached an agreement and, if so, the terms of that agreement. *The more the agreement advances the interests of you or your client, the more points you get.* If you do not reach an agreement, your “result” points are determined by the roll of two dice in front of the class:

Dice	Plaintiff's Points	Defendant's Points
2-5	0	3
6	1	2
7	Roll dice again	Roll dice again
8	2	1
10-12	3	0

I will treat partial or contingent agreements as “no agreement” so if you reach a partial or contingent agreement your result points will be determined by a roll of the dice, as above.

Instead of or in addition to the summary, other graded written assignments may accompany some negotiation and mediation exercises. This will be true of the 7th exercise. In addition, for the 7th exercise both the result and summary are doubled in potential point-value.

As noted on a previous page, in calculating final grades for this course, I will not consider each student's lowest exercise score. For a negotiation or mediation exercise, your “exercise score” is your result score plus your summary score.

Summaries of Negotiation and Mediation Exercises

Each exercise summary must be a Word document of more than one and less than two single-spaced typed pages. Submit your summary as an attachment to an email to which you also attach a pdf of any agreement you signed in the exercise. Both the summary and agreement must be submitted as attachments to an email, rather than in the body of the email. The summary's filename must include your last name. Failure to follow any of these instructions or late submission of a summary may be reflected in its grade.

The summary should:

- 1) Start with your name and the role you played in the exercise, such as, "plaintiff's lawyer." For the remainder of the summary, however, do not refer to yourself in the third person, *e.g.*, "plaintiff's lawyer offered to settle for \$50,000." Instead, say, "I offered to settle for \$50,000."
- 2) State what occurred during the exercise. State what each participant did, including the terms of any settlement offers. Be clear and concise.
- 3) Speculate why each participant in the exercise did what he or she did. While stating your own motivations may be easier, trying to understand the other participants' motivations is important. Rather than stating the obvious, *e.g.*, "Defendant started with a low offer because paying a lot of money was not in Defendant's interests," address more subtle or ambiguous actions of the participants. Rather than discussing motivations on the ultimate question of whether to settle or not, discuss motivations for more specific tactics during the negotiation or mediation process.
- 4) Assess the success or lack of success of what each participant did. In assessing each participant's success, discuss both whether the overall result of the exercise advanced a party's interests and whether particular behavior during the exercise, such as negotiation tactics, worked well. In discussing the overall result, do not use bland generalities like "The settlement was a success for Plaintiff because he got a significant amount of money and a success for Defendant because it avoided a costly and risky trial." Instead, predict what would have happened had the parties not settled—including the results of further litigation—and then compare that prediction to the settlement you reached. If you did not reach agreement, compare that prediction to the offers that were made (and not accepted) during the exercise.
- 5) Analyze all of the above using the concepts raised in the Hornbook and any other readings.
- 6) Integrate Points 2-5 into one coherent story. Do not separate your statement of something that occurred (#2) from your speculation about why it occurred (#3), its success (#4), or its relation to the course's concepts (#5). Weave that all together in each of your paragraphs.

<u>CLASS</u>	<u>ASSIGNMENT</u>
I. INTRODUCTION	
1.	Hornbook §§ 1.1 - 1.8, 3.43 - 3.45 1 st exercise assigned
II. ARBITRATION	
2.	1 st exercise due one hour before class Hornbook §§ 2.1 - 2.3, 2.64 - 2.65
3.	Hornbook §§ 2.4 - 2.14, 2.18, 2.39 - 2.44, App. A (Fed. Arbitration Act) 2 nd exercise assigned
4.	2 nd exercise due one hour before class Hornbook §§ 2.19 - 2.34
5.	Hornbook §§ 2.35 - 2.38 AAA Commercial Arbitration Rules (do not read Mediation Procedures) 3 rd exercise assigned
6.	3 rd exercise due one hour before class Hornbook §§ 2.45 - 2.48
7.	Hornbook §§ 2.49 - 2.63 4 th exercise assigned
8.	4 th exercise due one hour before class
III. NEGOTIATION	
9	Hornbook §§ 3.1 - 3.13. Do and discuss ungraded exercise in class.
10.	Hornbook §§ 3.14 - 3.22 Do 5 th exercise during class
11.	Summary of 5 th exercise due an hour before class
12.	Hornbook §§ 3.23 - 3.32 Do 6 th exercise during class
13.	Summary of 6 th exercise due an hour before class
14.	Hornbook §§ 3.33 - 3.42 7 th exercise (graded with double weight) and Negotiation Plan (graded) assigned
15.	Negotiation Plan due an hour before class Do 7 th exercise during class and, if you choose, longer

<u>CLASS</u>	<u>ASSIGNMENT</u>
16.	7th exercise agreement (formal, professional legal document) and summary due an hour before class
IV. MEDIATION AND OTHER PROCESSES IN AID OF NEGOTIATION	
17.	Hornbook §§ 4.1 - 4.16
18.	Hornbook §§ 4.17 - 4.26 Do 8 th exercise during class
19.	Summary of 8 th exercise due an hour before class
20.	Re-read Hornbook §§ 4.10 - 4.14 Do 9th exercise during class
21.	Summary of 9th exercise due an hour before class
22.	Hornbook §§ 4.27 - 4.28 Do 10th exercise during class
23.	Summary of 10th exercise due an hour before class
24.	Hornbook §§ 4.29 - 4.36. 11 th exercise assigned
25.	11th exercise due an hour before class
26.	Review