

610/670: Adversarial Processes

Fall 2022

Class Meetings:	Tuesdays, 9am-12:50pm
Location:	Knight Law 282
Instructor:	Michael Moffitt
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Course website:	Canvas

COURSE DESCRIPTION

This course is an introduction to the primary adversarial or adjudicative processes used to resolve civil disputes: Litigation and Arbitration. The course will explore the structure, conceptual foundations, and guiding principles through which the processes work, as well as their advantages and disadvantages for disputing parties. Students will develop an understanding with how the legal system and common approaches to arbitration operate as dispute resolution systems, develop comfort with key terminology and concepts, and compare and contrast the two systems. The goals of the course are to have students understand the basic features of the systems and to equip students for intelligent conversation and decisions regarding navigation and use of the systems.

LEARNING OBJECTIVES

As a result of taking this course, students will be able to:

- Understand the basic structure of the U.S. civil court system
- Appreciate and articulate similarities and differences between adjudication, various forms of arbitration, and other dispute resolution processes, including both mediation and negotiation
- Understand the principal policy and strategic considerations raised by litigation and arbitration's application to its most prevalent contexts
- Build capacity to advise clients on dispute process selection and on participation in contexts in which litigation or arbitration may be an option

COURSE TEXTS

Required

- Frank A. Schubert, Introduction to Law and the Legal System (11th ed.)
- Margaret Johns & Rex R. Perschbacher, United States Legal System: An Introduction (4th ed.).
- Michael Moffitt & Andrea Schneider, Dispute Resolution: Examples & Explanations (3d ed. Aspen 2014).
- Other readings will be available on the course website.

COURSE POLICIES

Accessible Education for All Students: The University of Oregon is working to create inclusive learning environments. Please notify me if there are aspects of the instruction or design of this course that result in disability-related barriers to your participation. If this course involves anonymous grading, please contact Interim Assistant Dean of Student Affairs, Sandy Weintraub, at sandymw@uoregon.edu for information on accommodations. You are also encouraged to contact the Accessible Education Center in 360 Oregon Hall at 541-346-1155 or uoaec@uoregon.edu.

Inclusion and Collegiality: Our community values inclusion. We are committed to equal opportunities for all faculty, staff, and students to develop individually, professionally, and academically regardless of ethnicity, heritage, gender, sexual orientation, ability, socio-economic standing, cultural beliefs, and traditions. We are dedicated to an environment that is inclusive and fosters awareness, understanding, and respect for diversity. If you feel excluded or threatened, please contact Associate Dean of Students Jennifer Espinola at espinola@uoregon.edu or 541-346-1557.

Pronouns: Note that most of the materials we will read, as well as much of our discussion in class **about those materials**, will use the pronouns “he/him/his” or “she/her/hers.” Gender is not binary, and some people prefer to use “they/them/their” or “ze/hir” for individuals. I try to limit the use of pronouns in class discussion. In writing, using pronouns that match their antecedent in number can be important for clarity. **However, I respect the choice to use plural pronouns to avoid gendered pronouns; if you choose to use a plural pronoun to replace a singular antecedent ("a person... they"), please include a footnote in your paper indicating that it is a conscious choice.** For more information on gender identity, please visit the LGBTQA3 office, <http://dos.uoregon.edu/lgbt>.

Reporting Obligations: I am an assisting employee. For information about my reporting obligations as an employee, please see Employee Reporting Obligations on the Office of Investigations and Civil Rights Compliance (OICRC) website. Students experiencing sex or gender-based discrimination, harassment or violence should call the 24-7 hotline 541-346-SAFE [7244] or visit <https://safe.uoregon.edu/> for help. Students experiencing all forms of prohibited discrimination or harassment may contact the Dean of Students Office at 541-346-3216 or the non-confidential Title IX Coordinator/OICRC at 541-346-3123. Additional resources are available at <https://investigations.uoregon.edu/how-get-support>. I am also a mandatory reporter of child abuse. Please find more information at <https://hr.uoregon.edu/policies-leaves/general-information/mandatory-reporting-child-abuse-and-neglect>.

Mandatory Reporting of Child Abuse: UO employees, including faculty, staff, and GEs, are mandatory reporters of child abuse. This statement is to advise you that your disclosure of information about child abuse to a UO employee may trigger the UO employee’s duty to report that information to the designated authorities. Please refer to the following link for detailed information about mandatory reporting: [Mandatory Reporting of Child Abuse and Neglect](#).

Academic Integrity: Students are expected to demonstrate high levels of academic integrity and professionalism and are prohibited from committing or attempting to commit any act that constitutes academic misconduct. Plagiarism and other forms of academic dishonesty will be grounds for automatic failure in the course. If you have questions about conduct please ask your instructor or review the University Student Conduct Code or the UO Policy.

Attendance: The School of Law believes that dependability and punctuality are essential characteristics of a good lawyer and that the development of good professional habits is essential for legal education. Students are expected to attend all classes and arrive punctually. JD and LLM students must attend a minimum of 80% of scheduled class meetings. Individual instructors may adopt a stricter attendance policy, in which case the instructor must include the policy in the course's syllabus. Penalties for failing to comply with governing attendance requirements include, but are not limited to, grade reduction and denial of course credit. Students are responsible for monitoring their own attendance, and no advance notice is required for the imposition of a penalty.

Participation: Many of the classes will be highly interactive as we build answers to questions we ask together. You will be expected to engage actively in these opportunities for joint inquiry and exploration. Your participation will contribute to the learning of your fellow classmates. Part of your grade will be determined by your participation.

Late Assignments: You are of course expected to turn in your assignments on time. If you are unable to turn in an assignment on time, please contact your professor to discuss whether an extension is possible (it may not be). Late assignments will be docked 10% for each day they are late.

Computer Use: Class-time is most rewarding for everyone if you actively listen, solve problems, ask questions, and engage in conversation. Therefore, please use laptops sparingly during class. Laptops promote multitasking of the worst kind since it is very easy to go off-task. This not only distracts you but also others in the class - plus you look foolish when browsing online. Laptops also enable you to mindlessly transcribe what is said in class instead of encouraging you to integrate information and select the most important information.

Building Safety: Emergencies are rare, but if they happen, we must know how to respond effectively and efficiently. The University's Emergency Management and Continuity group provides extensive resources for emergencies (see <http://emc.uoregon.edu/>). Please review these materials when you can, with special emphasis on the following:

- Identify all the exits in each of your classrooms;
- Practice being aware of your surroundings at all times; and
- Familiarize yourself with the basic procedures around **earthquakes** ("duck, cover, hold" at <https://www.youtube.com/watch?v=O-MycATjyppg>) and **active shooter situations** ("run, hide, fight" at <http://emc.uoregon.edu/content/active-shooter-situations>).

We are all responsible for the safety and well-being of our community. For more on emergency procedures and building safety, please talk with me about the situation in our classroom, with Dean of Students or Associate Dean for Finance and Operations.

Student Experience Survey: The midterm and end of term Student Experience Surveys will be conducted. These are your opportunities to provide feedback about your learning experience in this class. It's important to remember that the learning process is collaborative and requires significant effort from me, you, and the class as a whole. Students should provide thoughtful assessments of their experience, as well as of their own effort, with comments focused on the specific teaching and learning elements included. Comments regarding personal characteristics of the instructor are not appropriate and will not be considered. For this feedback to be as comprehensive as possible, all students should complete the survey.

What You Can Expect from Your Instructor:

You can expect me to:

- plan and facilitate learning opportunities that will help you meet the course goals and objectives
- provide constructive feedback on your performance
- be open to constructive feedback on my performance
- bring my teaching expertise and experience into the classroom
- be open-minded in responding to your ideas and suggestions
- allow you to wrestle with ideas to shape your own conclusions

GRADING

- Attend all class sessions and participate appropriately. (5%)
- Complete written assignments. (55%)
I will discuss the written assignments on the first day of class and I will provide greater guidelines on them throughout the term. These assignments will be due throughout the course. They vary in length and in nature. Some will be group projects, while others you will complete on your own. Please do not be misled by the structure of the assignments. Even if not all of them look like traditional graduate school writing projects, I will expect you to submit well written, carefully edited, professional products. Consistent with this, written assignments will be assessed based on: (1) the quality of writing and organization and (2) the demonstrated level of knowledge, understanding, and the ability to apply content covered in the relevant portion of the course.
- Final examination. (40%)
The examination may include true-false, multiple-choice, short answer, and essay questions. It is comprehensive and may include any of the material covered in class or the readings. The examination will be open-book and timed. There are no restrictions on materials that students can use for reference during the exam, except that your responses must be entirely your own. You may not collaborate with or seek the assistance of others in any way during the exam.

COURSE SCHEDULE

Class 1: An Introduction to Foundational Principles

Goals:

At the end of this session, students will:

- Gain familiarity with history and foundational principles of arbitration
- Begin to understand relationship between arbitration and adjudication
- Recognize distinctions between arbitration and other dispute resolution processes

Required Reading:

- Course Memo & Working Syllabus
- Michael Moffitt & Andrea Schneider, DISPUTE RESOLUTION: EXAMPLES & EXPLANATIONS, *Chapter 7 An Introduction to Arbitration* (sections 7.1-7.3)
- Menkel-Meadow, Love, Schneider & Sternlight, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, (2d ed. 2011), *Chapter 9, Arbitration: Models and Concepts* pp. 383-395.

Due:

- Student Survey (distributed electronically).

Class 2: Labor Arbitration

Goals:

At the end of this session, students will:

- Appreciate the policy implications of arbitration in collective bargaining context
- Understand the distinction between principal forms of labor arbitration in the United States
- Gain familiarity with the potential role(s) of arbitrators in labor disputes
- Appreciate the potential ethical implications of arbitral structures in labor disputes

Required Reading:

- "Arbitration: The 7 Tests of Just Cause" video (posted online)
- Menkel-Meadow, Love, Schneider & Sternlight, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL, (2d ed. 2011), *Chapter 9, Arbitration: Models and Concepts* pp. 387-401.
- Michael Moffitt & Andrea Schneider, DISPUTE RESOLUTION: EXAMPLES & EXPLANATIONS, *Chapter 7 An Introduction to Arbitration* (section 7.4: "How

Courts Handle Reviews of Arbitrators' Decisions")

- Eastern Associated Coal v United Mine Workers, 531 U.S. 57-69 (2000).
- ALAN SCOTT RAU, EDWARD SHERMAN & SCOTT PEPPET, PROCESSES OF DISPUTE RESOLUTION (4th ed.) "Final Offer Arbitration" pp. 935-941.

Due:

- *Labor Arbitration Research Project*

Class 3: Consumer Arbitration

Goals:

At the end of this session, students will:

- Be introduced to the legal doctrines underlying modern consumer arbitration
- Appreciate the potential for application of consumer arbitration structures in broader contexts (e.g. employment, health care, etc.)
- Explore the policy implications of the current consumer arbitration regime
- Reflect on the implications of mass imposition of adhesion arbitration regimes for dispute resolution generally

Required Reading:

- Jeff Sovern et al., "Forced Arbitration and the Fate of the 7th Amendment" and "Whimsy Little Contracts", *Dispute Resolution Journal*, 71(3), 55-75.
- Hiro Aragaki, "Arbitration: Creature of Contract, Pillar of Procedure," *Arb. Law Rev.* 1-19
- Hiro Aragaki, "Constructions of Arbitration's Informalism", *J. Disp. Resol.*, 141-169.
- (Optional) Video of Senator Feingold visit to University of Oregon, discussion of Arbitration Fairness Act (posted online)

Due:

- *Consumer Arbitration Reaction Paper and Discussion Questions Assignment*

Class 4: International Arbitration and Other Applications of Arbitration

Goals:

At the end of this session, students will:

- Begin to understand existing applications of arbitration in public and private disputes internationally
- Appreciate the impacts of sovereignty on foundational arbitration principles

Required Reading:

- Menkel-Meadow, Love, Schneider, and Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, “Key Ethical Issues in Arbitration” pp. 580-582
- Richard Reuben, “Confidentiality in Arbitration: Beyond the Myth,” pp. 1255-1259, 1294-1300.
- Menkel-Meadow, Love, Schneider, and Sternlight, *Dispute Resolution: Beyond the Adversarial Model*, “International Arbitration” pp. 457-460
- Carrie Menkel-Meadow “Are Cross-Cultural Ethics Standards Possible or Desirable in International Arbitration?”, 5-26
- Jeffrey W. Sarles, “Solving the Arbitral Confidentiality Conundrum in International Arbitration”, 1-18

Due:

- *Name of case and group assignment (instructions discussed in class)*
- *Preparation of presentation of International Arbitration Case (instructions distributed in class and posted online)*

Class 5: Arbitration in the ADR Landscape

Goals:

At the end of this session, students will:

- Understand non-binding arbitration’s application and distinction from traditional binding arbitration
- Draw connections between arbitration’s policy and practice and that of other dispute resolution mechanisms
- Reflect on ethical distinctions stemming from dispute processes, rather than from dispute contexts
- Begin to build capacity to advise clients on dispute process selection

Required Reading:

- Mumbai Partners Case Study (case and instructions distributed in class)

- Michael Moffitt & Andrea Schneider, "Dispute Resolution: Examples & Explanations" Chapter 6 "Dispute Resolution within the Court System" (in particular section 6.4 "Non-Binding Arbitration")
- Frank Sander & Stephen Goldberg. "Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure," 10 *Negotiation Journal* 49-68 (1994).
- Frank Sander, "Varieties of Dispute Processing" in *The Pound Conference: Perspectives on Justice in the Future* (A. Levin & R. Wheeler eds.).
- Jeffrey Senger, "Federal Dispute Resolution" (excerpt)
- FOLBERG, GOLANN, STIPANOWICH, AND KLOPPENBERG, *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* (2d ed.), "When an Arbitrator Wears Multiple Hats" pp. 603-609.
- ALAN SCOTT RAU, EDWARD SHERMAN & SCOTT PEPPET, *PROCESSES OF DISPUTE RESOLUTION* (4th ed) "Med-Arb" pp. 941-942.
- Lon Fuller, "Collective Bargaining and the Arbitrator" excerpted in ALAN SCOTT RAU, EDWARD SHERMAN & SCOTT PEPPET, *PROCESSES OF DISPUTE RESOLUTION* (4th ed.) "The Arbitration Proceeding" pp. 942-951.

Due:

- *Negotiated Dispute Resolution Clause for the Mumbai Partners Case Study*

Class 6: Characteristics of the Adjudicatory System for Resolving Civil Disputes

Goals:

At the end of this session, students will:

- Gain a basic understanding of litigation and litigated disputes
- Compare these to the characteristics of arbitration

Required Reading:

- Schubert, pp. 38-43, 77-82, 89-100, 102 (administrative agencies only), 113-120, 519-520
- Watch Marbury v. Madison video before class
- Johns & Perschbacher, 81-125
- McDonald's Burned Itself, *The Legal Times*, Sept. 19, 1994, pg. 26
- Campaign Cash Mirrors A High Court's Ruling, *NYT*, Oct. 1, 2006
- Yes, There are 'Obama Judges' and 'Trump' Ones, Too, Oct. 2, 2019
- Jeffrey Toobin, How Obama, Roberts Interpret Laws in 'The Oath.'
- Trump's Transformation of the Courts Barrels Onward, Dec. 20, 2019

Due:

- *Litigation & Arbitration Characteristics Comparison*

Class 7: Reading Cases and Understanding Development of the Common Law Through Adjudication

Goals:

At the end of this session, students will:

- Be able to read and identify the basic parts of a legal case, including the issue, governing doctrine, interpretive structure, and holding
- Understand judicial approaches to interpreting statutes
- Appreciate the potential for litigated outcomes to impact other disputes

Required Reading:

- Schubert, 12-23, 100-104, 106-107, 110
- Johns & Perschbacher, 129-163, 177-201
- Frederick Schauer, Stare Decisis-Rhetoric and Reality in the Supreme Court, *The Supreme Court Review*, 2018(1), 121-143.
- Stanley Fish, Intention and Canons of Statutory Interpretation, *New York Times*
- Richard A. Posner, The Incoherence of Antonin Scalia, *The New Republic*.
- *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574-588 (1999).
- Broken Bench, *New York Times*, Sept. 26, 2006.

Due:

- *Name of case and group assignment (instructions discussed in class)*
- *Preparation of presentation of a Supreme Court Case (instructions distributed in class and posted online)*

Class 8: Procedures in Litigation Cases

Goals:

At the end of this session, students will:

- Understand the basic structure and timeline of a legal case
- Describe the availability of discovery processes
- Discuss outcomes and available remedies in litigation

Required Reading:

- Schubert, 154-156, 159-170, 171-177, 181-183
- Select Evidence Rules
- *Upchurch v. Rotenberry*, 761 So. 2d 199-209 (Mass. 2000)
- *Soller v. Moore*, 84 F.3d 964-970 (7th Cir. 1996)
- *Shanklin v. Norfolk S. Ry. Co.*, 369 F.3d 978-998 (6th Cir. 2003).

- Skim Ahmed M. Megreya & A. Mike Burton, *Matching Faces to Photographs: Poor Performance in Eyewitness Memory* (with the Memory), 14 J. Experimental Psych. 364-72 (2008)

Due:

- *Presentation of a Supreme Court Case (instructions distributed in class and posted online)*

Class 9: Judges and Judicial Authority

Goals:

At the end of this session, students will:

- Understand the basic approaches to selecting judges
- Appreciate the influence of public policy on legal decisions and the implications of litigation outcomes for public issues

Required Reading:

- Williams-Yulee v. Florida Bar, 135 S.Ct. 1656, 1661-86 (2015)
- Johns & Perschbacher, pp. 3-79
- Demand Letter to Regents of the University of California, Oct. 29, 2019
- How U.S. Immigration Judges Battle Their Own Prejudice, NYT, Oct. 4, 2016
- Schubert, pp. 4-8 (Legal Realists through Determining Desirable Public Policy), 123-138, 140-141, 144-148

Due:

- *Judicial Biographies*

Class 10: A Closed and Open Public System: Relief, Limitations in Seeking Relief, and Public Scrutiny

Goals:

At the end of this session, students will:

- Appreciate the public nature and impacts of litigation
- Discuss interests implicated in the resolution of disputes through litigation and arbitration

Required Reading:

- Schubert, 224-251 (Please read text only, not the cases, except read the case on page 245), 188-205, 209, 212-213, 215-220, 520-523, 527.

- Trump v. New York, 592 U. S. ___, 1-10 (2020) (read majority opinion and Part I of dissent)
- Delaware Coalition for Open Government, Inc. v. Strine, 733 F.3d 510, 515-26 (3d Cir. 2013)
- Marjorie Corman Aaron, Reflections on Untethered Philosophy, Settlements, and Nondisclosure Agreements, 1-5

Appendix A – Hyflex Information

We will discuss how the class will work on the first day, but there is some basic information on the policies that you should know before then.

1. Expectations on in-person vs remote attendance. The current policy is that students who reside locally (e.g., those in the Eugene/Springfield area who are attending their other classes on campus) are expected to attend class in person while those who are outside of the Eugene metropolitan area (e.g., students in the Portland Program) may attend remotely. As with most things, there is also a COVID-19 exception. Consistent with the current UO regulations 3.4 (<https://coronavirus.uoregon.edu/covid-19-regulations>), we are all responsible for screening ourselves for possible infection. If you reside locally but believe you may or do have an infectious disease and feel up to it, you may attend class remotely. If you do so, please let me know in advance, if at all possible. (It probably should go without saying, but if you don't feel up to it, then, as indicated in the syllabus, please let me know you will be missing class, watch the recording as soon as you are able, and ask a couple of your classmates for notes.)

2. Technology for accessing class. Classrooms have been outfitted with technology, including in class microphones and speakers, that should allow us all to participate and interact with each other (assuming it is working and no user error on my part).

A. Remote students. Remote students should log into the Zoom classroom session similar to last year. You should expect to have your camera on if at all possible (the in person students and I will be able to see you, as would be the case if you attended in person), mute unless you are speaking, and use the raise hand function to get attention, and only use the chat function to report technical issues, not engage with the substance of the class.

B. In person students. In person students should not need to bring laptops and log into Zoom. (If the classroom technology has issues for some reason, in person folks will need access to Zoom and headphones to hear the remote students, so perhaps bring them for the first class or two as we get everything sorted out.)