

DISPUTE RESOLUTION SUMMER INSTITUTE

ARBITRATION

July 24 – July 30, 2013

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Learning Outcomes

At the conclusion of this course, a person will be able to:

1. Express understanding of the arbitration process, the role of the arbitrator, including his/her functions, duties and responsibilities, and practical issues associated with the operation of arbitration.
2. Analyze whether he/she agrees with many people that arbitration has potential benefits as a dispute resolution mechanism. Based on specific facts, arbitration may be beneficial for reasons such as providing easier access to justice; being simpler and more flexible than court; having lower overall cost; etc. These benefits are sometimes summarized as “quick, efficient, economical and fair.”
3. Articulate current issues regarding uses and practices of arbitration, including various critiques of arbitration, especially for consumer matters.
4. Survey cultural aspects of dispute resolution specific to arbitration.
5. Demonstrate ability to analyze rulings of the United States Supreme Court and other courts that have shaped the practice of arbitration in the United States and the legal procedures and doctrines needed to use arbitration successfully, including international procedures. Arbitration clauses in almost all commercial contracts are interpreted by the Federal Arbitration Act, even when actions are brought in state court.
6. Examine Minnesota case law, rules of court, and ethical rules and standards regarding arbitration.
7. Give practical advice regarding drafting, adoption or enforcement of appropriate arbitration clauses.
8. Show development of basic advocacy skills needed to participate in arbitration.
9. Present information about arbitration to a group.

Class

The class includes lectures, videos, discussions, student presentations and simulation. The class meets in the Law School Moot Courtroom:

Wednesday	July 24	4:30 - 9:15 p.m.
Thursday	July 25	4:30 - 9:15 p.m.
Saturday	July 27	9:00 am – 5:00 p.m.
Monday	July 29	4:30 - 9:15 p.m.
Tuesday	July 30	4:30 - 9:15 p.m.

The grade in the course will be determined as follows:

Class participation	25%
Final Paper	75%

Material for the final paper will be distributed at the last class session. The final paper will be due August 13, by 4 p.m. Precise description of the submission process will be included with the final paper instructions to be distributed at the last class, July 30.

Class attendance and **class participation** are required. Please attend every hour of class, have read the reading assignments prior to class, be prepared to discuss the assigned reading, and participate in class assignments, exercises, and discussions when those occur.

Course Materials

1. Arbitration Advocacy, Second Edition, Cooley and Lubet (NITA ISBN 1-55681-799-1)
2. Minnesota Arbitration Supplement (Available in DropBox. It will also be distributed on the first day of class.)
3. Dropbox readings (the link to the Arbitration-Roberts folder is https://www.dropbox.com/sh/e5fe6rcc30bi1n6/pD4BHWI_1t)

NOTE: Academic Rule AR-105(B)(8): A student who does not take a scheduled examination will receive a grade of "F" for that examination, unless properly excused. In addition, any student who does not turn in a required paper on the scheduled date will receive a grade of "F" for that paper, unless properly excused. Failure to meet any course requirement can be the basis for a final grade of "F" in the class, unless properly excused.

Class 1: Wednesday July 24

READING ASSIGNMENT

1. Arbitration Advocacy

Read

Preface, xxvii-xxviii

1– 54 General description; general considerations;
drafting the agreement; introduction to ethics

65 – 71 Civility guidelines

73 - 93 Pre-hearing advocacy

2. Supplement (read in Dropbox; printed Supplement will be distributed at the first class)

Skim Minnesota General Practice Rule 114: Alternative Dispute Resolution, to gain understanding of current uses of arbitration in resolving litigated disputes in Minnesota. You will read Rule 114 in-depth for Saturday, July 27.

3. Read Note 1, page 7 of Syllabus.

OTHER ASSIGNMENT

1. Look for at least one arbitration clause that exists in **your** life, skim it, and bring a copy to class with your name in the upper right hand corner, to be turned in to me. Bring one for you to read along with, also, if it is not extremely long. Places to look might include: written employment contract; credit card agreements; health club contract; cell phone contract; recent consumer purchase contract. These are just ideas of places to look. We want to develop a feel for how ubiquitous arbitration is in our world today.

2. Think about your personality, your approaches to conflict, and the activities in which you prefer to engage. As you read the material, begin to think of yourself in the role of arbitrator. Do you think you would be good at it? Do you think you would enjoy it? Why or why not? We will discuss this in class.

Topics Covered:

Introduction to the course and expectations
Techniques of dispute resolution
Comparison of mediation and arbitration
Introduction to arbitration
Arbitration of various types of disputes

Drafting the agreement to arbitrate
 Selecting cases for arbitration
 Choosing the forum
 Advocate ethics
 Pre-hearing advocacy
 Case assignments for discussion Saturday
 National Arbitration Forum (Note 1, page 7 herein.)

Class 2: Thursday July 25

READING ASSIGNMENT

95 - 105 Preparing for arbitration
 107 – 143 Advocacy during the hearing
 189 – 197 Use of exhibits
 207 – 219 Final argument

Skim only: 143 - 189

Skip: 197 – 206; 220 – 237

Class activity will include **viewing and analyzing** a videotape of arbitration. Before we view the tape, you will be assigned with other group members an area of this material on which to concentrate while watching the tape. Your group will discuss your observations, and then you will give the class your analysis.

Class 3: Saturday, July 27

READING ASSIGNMENT

1. Supplement:

Minnesota Rule and Statute Summary
 Minn. Stat. Section 572.08 - 30 Uniform Arbitration Act
 Minn. Stat. Section 595.02(1)(a) Alternative Dispute Resolution Privilege
 Minn. Stat. Section 604A.32 Alternative Dispute Resolution Immunity
 General Practice Rule 111.05: Collaborative Law
 General Practice Rule 114: Alternative Dispute Resolution - Skim for references to arbitration and adjudicative processes, and **read** those portions
 Special Rules of Practice for the District Court, Second Judicial District, Rule 25
 Federal Rules of Evidence, Rule 408

You will divide up responsibility for reading cases posted on Dropbox. Case assignments will be made in class Wednesday.

2. **Dropbox**

On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence, 48 Hous. L. Rev. 457 (2011).

Claim-Suppressing Arbitration: The New Rules, 87 Ind. L.J. 239 (2012).

3. **Arbitration Advocacy**

Skim Appendix G, AAA Commercial Arbitration Rules, reading the names of the rules (in bold) unless you are moved to read any of the actual rules

Read Appendix N, Federal Arbitration Act

Read Appendix R, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards

OTHER ASSIGNMENT

For Class 4 each of you will **present** information about various types, uses or subject matters of arbitration. We will discuss this Wednesday, to give you more details for organization. Most of you will need to do outside research. You are welcome to comment about special provisions that might be found in the agreement to arbitrate; the way the agreement is reached or imposed; distinctive considerations relevant when selecting an arbitrator or panel; etc. You may choose topics about which to comment.

Here are a few more possibilities to include in your presentation, not requirements:

The law of arbitration: Any special laws that apply?

International	Federal	State
Local	Case law	Customary law

Potential issues in arbitration: Are any more likely to occur in your type?

Place	Time
Cost	Pre-hearing issues
Arbitrability	Discovery/evidentiary
Past Practice/Custom	Enforcement
External law	Public policy
Subpoena power	Special clauses
Publicity	Confidentiality
Types of decisions (written vs. non-written or reasoned)	

Are there any arbitration procedures specific to your type of arbitration?

Are there any special ethical considerations that apply?

Has this type of arbitration been criticized recently, and if so, why?

Class 4: Monday July 29

READING ASSIGNMENT

Preparing your presentation is your reading assignment.

CLASS ACTIVITY

We will **prepare** for the arbitration **Simulation** you will do on Tuesday.

Class 5: Tuesday July 30

READING ASSIGNMENT

1. Arbitration Advocacy

54 - 65 Arbitrator Ethics

The entire Code of Ethics for Arbitrators in Commercial Disputes appears in Appendix I, should you choose to read it all.

249 - 264 Hybrid Processes; Settlement Techniques

2. **Dropbox**

General Practice Rule 114 Appendix: Ethics Code and Enforcement Procedure

Order of Minnesota Supreme Court regarding Minnesota Rules of Professional Conduct and selections from new Rules of Professional Conduct. IF you are interested, the full text of the new Minnesota Rules of Professional Conduct is available at: <http://www.courts.state.mn.us/lprb/05mrpc.html>

In re Petition for Disciplinary Action against Chester D. Swenson, 696 N.W.2d 350 (Minn. 2005).

“Arbitration Concerns”, 5 Minn. Prac. Methods of Practice: Civil Advocacy, Section 12.4.3 (2005 ed.)

OTHER ASSIGNMENT

We will do an arbitration **simulation**. You will get role assignments earlier in the course.

Read Note 2, page 8 herein.

Note 1 Read for Class 1

In July 2009, the Minnesota Attorney General filed suit against the National Arbitration Forum (NAF), asserting claims for fraud and deceptive practices. Complaint, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18559 (Minn. Dist. Ct. July 14, 2009), *available at* <http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf>.

The Attorney General's complaint alleged that the NAF had failed to disclose that it was affiliated with a major debt collection firm that appeared in arbitrations it administered. Less than a week later, the NAF settled the litigation, in part by agreeing permanently to stop administering new consumer arbitration cases. Consent Judgment, ¶ 3, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18559 (Minn. Dist. Ct. July 17, 2009), *available at* <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

Shortly thereafter, the American Arbitration Association announced its own moratorium on the administration of most consumer debt collection cases (although not claims brought by consumers against businesses). American Arbitration Association, Notice on Consumer Debt Collection Arbitrations, *available at* <http://www.adr.org/sp.asp?id=36427> (last visited May 6, 2011).

The AAA's action was not in response to any actual or threatened litigation, but rather was based on its "experiences administering debt collection arbitrations" and "its consideration of a number of policy concerns that have been raised." Testimony of Richard W. Naimark on Behalf of the American Arbitration Association, *Hearing on Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*, Subcommittee on Domestic Policy, House Oversight Committee, 111th Cong., 1st Sess. (July 22, 2009), *available at* <http://www.adr.org/si.asp?id=5770>. In October 2010, a task force convened by the AAA issued a Consumer Debt Collection Due Process Protocol, supplementing its Consumer Due Process Protocol with additional protections for consumer debtors. See National Task Force on the Arbitration of Consumer Debt Collection Disputes, Consumer Debt Collection Due Process Protocol — Statement of Principles (Oct. 2010), *available at* <http://www.adr.org/si.asp?id=6248>.

The AAA has not, as far as known, ended its moratorium on administering most such cases.

Note 2 Read for Class 5

Regarding ethics complaints in Minnesota, According to the Minnesota Judicial Branch website, “ADR Frequently Asked Questions” link, accessed **June 12, 2013**):

“What are the most common complaints received by the [ADR Ethics] board regarding ADR neutrals?”

Between 1998 and June 2013:

13 complaints filed against neutrals on the civil facilitative (mediation) roster.
2 complaints filed against neutrals on the civil adjudicative/evaluative roster.
127 complaints against neutrals on the family facilitative (mediation) roster.
Of those 127, 64 were complaints against parenting time expeditors.

How many complaints are dismissed as unfounded?

Between 1998 and June 2013:

Of the 144 complaints, 64 were dismissed without investigation and 80 were investigated.

Of the 80 complaints that were investigated, 37 were determined to be ethical violations and 43 were dismissed.

Could you give us a breakdown of the number of ethics complaints by each Rule 114 Code of Ethics Rule number?

Total complaints of alleged ethical rule violation by rule (1998 – June 2013):

Impartiality	96
Conflicts of Interest	48
Competence	47
Confidentiality	50
Quality of Process	110
Advertising	16
Fees	46
Self-Determination	32