

Using Alternative Dispute Resolution in Legal Writing Courses

By Kathleen Portuan Miller

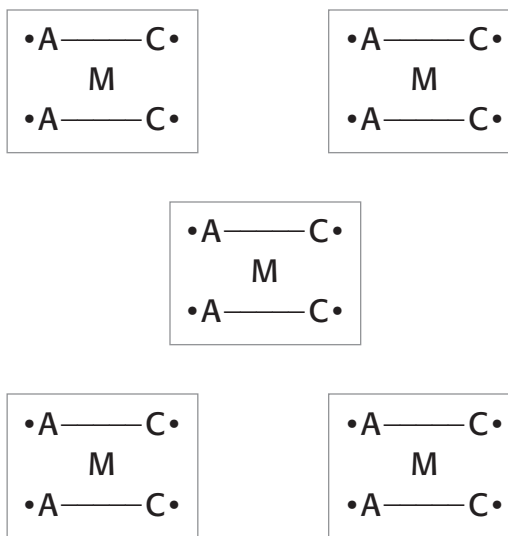
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Alternative Dispute Resolution (ADR)—specifically mediating and writing a mediated agreement—can be incorporated into a legal writing assignment.¹ When a legal research and writing class is a three-credit course, or if an interesting assignment is needed in a two-credit course, ADR is great. In some law schools, particularly in Texas, where the majority of cases are settled, ADR is part of the six-credit legal writing curriculum. In a growing number of law schools, mediation has become very important in the curriculum since many state courts have now required mediation. Florida, for example, has mandatory mediation in all divorce cases. Louisiana, where I teach, has just passed a new mediation law. Specifically, I expect the students to learn how to mediate a problem, and how to write a mediated contract—which they end up doing very well.

How to Set Up the Exercise

First, I set aside one class—10 minutes for the lecture, and 45 minutes for the mediation. The classroom should be arranged in the format at right.

All parties in the mediation should be at the same physical level. Students should mediate in the same room, or in a hall nearby the room, so the professor can be an observer. If there is the luxury of more time, a video on a mediation can be shown before the actual mediation.



Key

(Classroom of 25 Students)

M = Mediator A = Attorney C = Client

The Lecture

I always begin this exercise with a short lecture. On one occasion, I had a master mediator come and share his experiences, after he gave a short lecture. A sample lecture includes the following points:

- Mediation is a process in which persons involved in a dispute attempt to settle their differences by reaching a voluntary agreement with the assistance of a neutral third party—the mediator. He or she does not have to be an attorney. Mediation can be binding if a contract is signed.
- The mediator's role is that of a facilitator. A mediator's task is to assist the participants in voluntarily reaching their own mutually acceptable resolution of the issues in dispute. The mediator facilitates communication

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¹ Information in this article was taken from the training I received from the South Plains Association of Governments—Dispute Resolution Center, Basic Mediation Training.

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between the parties by helping them identify and explore attitudes and feelings that have kept them from understanding and talking to each other. The mediator controls the structure of the hearing, but not the content.

- The mediator gathers information by asking questions, by listening, by demonstrating empathy, and by persuading the parties to settle. A mediator is committed to his/her objectives: that each party has the opportunity to be heard, to help the parties to separate and articulate their feelings, to help the parties to evaluate and formulate options, and to help the parties design an agreement.
- Benefits of mediation include affordability, convenience, timeliness, privacy, settlement, effectiveness, and satisfaction.

The Assignment

In the assignment, a student (attorney) and student-partner (client) team mediates with another student-partner team, using the help of a student mediator. When the team reaches an agreement with the help of the mediator, each student participant individually drafts a mediated agreement that reflects the decision of the parties. The students mediate in a class session; then each one drafts a mediated agreement to be submitted as a graded assignment. (The agreement can also be written by a team of two students.) Each student has been given several samples or outlines of mediated agreements. The students are encouraged to do research and find an appropriate form.

One source I recommend is *Mediation: Principles and Practice*, by Kimberlee K. Kovach (2d ed. 2000). This text has a mediation problem called the “Slippery Grape,” which can be used for the mediation. In the Slippery Grape assignment, a customer slipped on a grape peel at the Big Bag-N-Save Supermarket, and suffered severe pain in the left knee and lower back, and pain in the right shoulder. The customer was seeking \$100,000 compensation for the injuries, medical bills, lost wages, and mental anguish. (All the students are given this fact pattern.)

Students mediating for the customer are also given another fact pattern with confidential information: the customer was self-employed and did not have health insurance. She still owed \$5,500 for out-of-pocket expenses. The customer had been unable to continue work for the past six months as a yoga instructor since the fall. However, she had been doing some consulting work and thought that she would be able to continue soon with her job as a yoga instructor.

Students representing Big Bag-N-Save Supermarket are also given an additional fact pattern with confidential information: the store was insured up to \$500,000. Because of severe financial problems, the store needed to resolve this case for as little out-of-pocket cost as possible. However, retaining customers was of utmost importance to the store and its future. Store maintenance was one of the areas where the manager cut back. The store knew that the customer had continued to meet with yoga students.

The Mediation

When I used this problem in the past, each group worked enthusiastically to reach an agreement. Even the quietest students participated. I was surprised just how serious and enthusiastic the students were. The groups were very lively. Each group *had* to come to some agreement. If the students came to an impasse, they could mediate outside of class for one more class period.

I was surprised that the five groups came to five different agreements. But everyone seemed satisfied with the final agreement, and everyone told me they really enjoyed the experience. The students told me that the mediation was one of their favorite assignments because they really felt as if they came to a fair solution to a problem.

The Written Mediated Agreements

Students also told me that they enjoyed working on the written agreements. Students were instructed to include the date of the mediation, the names of the parties in the mediation, the agreement of the parties, the signatures of the parties, and the date

that the mediation was signed. Each written agreement was carefully typed, or filled in, and signed by the parties. For example, one group came to the agreement that the store would settle for \$45,000 if the customer would agree to no more suits. Another group settled for a lump sum of \$36,000 and \$100 in groceries. A third group settled for \$22,000 to offset consulting income, plus \$300 in store coupons. Group four settled for \$30,000 and donation of 50 dinners by the store to the customer's church. Group five was still working on the agreement at the end of the class, and finished after 10 more minutes outside of the class.

The Result

Each mediation ended with a sense of achievement and a sense of renewed energy. A mediation exercise inserts active learning into a writing class, allows students to develop critical problem-solving skills, and reinforces the importance of both oral and written communication.

Advice

I found out from experience that divorce mediation problems can be painful for some students. I would probably steer away from divorce situations since they can trigger hidden emotions. Over time, I have used a variety of problems, including a problem involving a mediation about water allocation in a real-life Middle East situation. The mediation showed just how relevant and timely mediation really is. I was surprised how many creative solutions the students had. The key to a successful mediation exercise is to prepare the students in advance. The class before the mediation, I give the students a packet with information and a copy of the mediation problem. And finally, be advised that the additional time you invest in running a mediation exercise will be rewarded in terms of student engagement.

Selected sources for mediation exercises:

- Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers* (2d ed. 1998). The Instructor's Manual has many interesting mediation assignments.
- Kimberlee K. Kovach, *Mediation: Principles and Practice* (2d ed. 2000).
- Jack W. Cooley, *Creative Problem Solver's Handbook for Negotiators and Mediators* (2005).

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