

**How We Got To Yes:  
Introducing an ADR Practicum at the  
University of Toronto Faculty of Law**

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*Alternative Dispute Resolution*

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## **Introduction**

Increasingly, Alternative Dispute Resolution (ADR), such as negotiation, mediation and arbitration, have been relied upon to resolve conflicts outside the traditional adversarial system. In fact, these types of dispute resolution techniques are no longer "alternative", and have been incorporated into mainstream conflict resolution, including litigation. Despite the recognized importance of ADR, however, law students are only exposed to these initiatives in a cursory manner. This is especially true at the University of Toronto Faculty of Law.

This proposal consists of three broad sections. The first, titled "Background Research", discusses the importance of ADR generally; the importance of ADR in legal education; the shortfalls of the current ADR courses offered in law schools throughout the country (and at U of T in particular); an in-depth discussion of the objectives of an ADR practicum course; and finally, some of the ways in which other law schools in Canada have integrated ADR programs into their curricula.

The second section, titled "Negotiation Preparation", sets out seven elements for consideration in preparing for a negotiation. In approaching the administration with our proposal for an expanded ADR curriculum, we have adopted this process. This section includes an analysis of the parties' interests; alternatives to a negotiated agreement; options for implementing the practical ADR component, including a discussion of the ways in which 3 law schools in North America (namely the law schools of the University of British Columbia, the University of Windsor and Harvard) have integrated a practicum; objective criteria for evaluating the options; and a discussion on communication, relationships and finally commitment. Lastly, the "Debrief" section consists of a discussion of both the negotiation session as well as of the group process involved in the project as a whole.

## **I. BACKGROUND RESEARCH**

### **1) Importance of ADR Generally**

There is a growing recognition in the legal community that the traditional adversarial system can be limited in its effectiveness. While the adversarial system may yield satisfactory results in many

instances, increasingly people are turning away from the adversarial system to resolve their disputes. More specifically, the adversarial system does not promote continuing relationships between the parties. Kenneth W. Acton notes that some further shortcomings of the adversarial system are that "[i]t is hard on the people involved, it is expensive, unpleasant and seldom yields a winner that is completely satisfied with the outcomes and almost invariably has at least one loser." As a result, it can often be unhelpful in resolving conflict in a satisfactory manner for the parties involved. Consequently, ADR has emerged as a method of obtaining fair, faster, effective and affordable justice by allowing parties to control the process. In discussing the potential impact of the rapid growth in mediation programs on the legal profession, Ellen Zwiebel asserts that the use of mediation processes can "transform how we think about and engage in legal practice."

Indeed, general interest in ADR initiatives has increased significantly in recent years. For example, Professor Paul Emond, director of the LL.M program in ADR at Osgoode, remarks that "we have been not just pleasantly surprised, but almost overwhelmed by the interest in the program from practitioners." As a result of its appeal, Osgoode Hall Law Journal devoted an entire issue in 1998 to dispute resolution, and to ADR in particular. Allan Stitt, an ADR practitioner, confirms that there is substantial interest in ADR across Canada and abroad. Stitt claims that ADR is not merely a passing trend or fad; many view ADR as "the natural evolution of the process of resolving disputes."

The Canadian Bar Association (CBA) arranged a Task Force on ADR in 1989, focusing on the three primary methods of negotiation, mediation and arbitration, to survey its potential impact in Canadian society. Among its findings, the Task Force concluded that the use of ADR processes to resolving disputes has a broad application to numerous substantive areas of law, including labour, family, criminal, environmental, native, commercial and public law. A number of provinces, recognizing the difficulties with the adversarial system and concurring with the results of the Task Force, have responded by implementing several ADR processes, such as mandatory mediation programs. Recently in Ontario, the Attorney General has introduced mandatory mediation for most civil actions.

Not only has the judicial system increased its use of ADR initiatives, but also numerous North American corporations have adopted ADR techniques to resolve disputes. According to a survey conducted by Cornell University 84% of the 1,000 largest U.S. corporations are "likely" or "very likely" to employ mediation in the future. Moreover, corporate representatives foresee the use of mediation to continue to grow in a wide variety of disputes.

## **2) Importance of Teaching ADR in Law School**

As mediation and other collaborative problem-solving processes become more prevalent in society and in the courts, law schools should devote more time to courses in the areas of negotiation and conflict resolution. As Catherine Morris remarks, "it seems that the current widespread demand for a more publicly satisfying and cost-efficient justice system is a significant factor pushing law schools toward offering more ADR options."

ADR education is particularly important because of the complexity of the processes involved. The CBA states that "given the interdisciplinary nature of ADR, the complex skills associated with ADR practice and the uncertainty and misunderstanding that surrounds ADR both within the legal profession and in the community at large." Law students need instruction on when such processes are appropriate and how to properly engage these methods of dispute resolution. The CBA report concludes with a general endorsement of ADR education, emphasizing the necessity of acquiring ADR training and skills in order to meet the changing dynamic of the legal profession.

Justification for teaching ADR in schools therefore comes partly as a response to the new demands on the legal profession to understand ADR processes. More specifically, it is founded in the community interest in ADR; the above-mentioned recommendations of the CBA for law schools to offer mandatory training in conflict management and dispute resolution options; the Attorney General of Ontario's decision to introduce mandatory court-connected mediation for most civil actions; the Federal Government's Dispute Resolution Policy encouraging the use of various dispute resolution processes and providing extensive training and support for many government agency dispute resolution initiatives. All of the above indicate the importance of gaining knowledge about ADR processes in order for "law school curriculum [to] lead the profession, not just conform to the existing standard."

### **3) Problems with the Current Curriculum at Canadian Law Schools**

Despite the importance of ADR, students in law schools across Canada are only exposed to it in a cursory way, as a result of the dominance of the adversarial dispute resolution model. Thus while ADR processes are becoming increasingly pervasive, their importance has yet to be recognized in general in law school curricula, and at U of T law school in particular.

At the time that the CBA's recommendations were made, seven Canadian law schools had specific courses on ADR, but the CBA noted that the nature and scope of exposure was uneven across schools. As a result of the unequal and often superficial exposure to mediation and other interest-based methods of conflict resolution, the perception of both the lawyer and the legal process as inherently adversarial is perpetuated by the law school. Consequently, "[a]lthough courts, governments, and organizations such as the Canadian Bar Association have incorporated mediation into the legal system... "real" lawyers are still perceived to be litigators and hard-nosed positional bargainers working in an adversarial system." As a result, a gap emerges between the needs of litigants for non-traditional processes and lawyers who lack the skills necessary to engage in ADR processes.

Jonnette Watson Hamilton maintains that "[n]inety percent of what goes on in law school is based upon the model of a lawyer working in or against a background of litigation of disputes that can be resolved by the application of a rule by a third party." Thus, many law students retain the notion that, in order to promote justice, advocates must conform to the image of the uncompromising litigator and will be perceived as weak if they adopt co-operative problem solving techniques. Implementing a conflict resolution program with a practical component would give students the confidence to apply a variety of methods, teaching that there is much to be gained by acting as dispute preventors and resolvers.

### **4) Objective of an ADR Practicum Course**

As previously noted, the challenge facing law schools is to provide students with a well-rounded legal education, balancing the instruction of both traditional forms of legal practice with evolving understandings of the practice and theory of conflict resolution and prevention. A law school practicum course on alternative forms of conflict resolution would work towards the achievement of that goal by integrating practical skills into the curriculum, forcing students to contemplate legal problems in terms of both the rights-based and interest-based approach.

More specifically, an ADR training program would incorporate the type of mediation that facilitates a collaborative, integrative problem-solving approach, using the interest-based negotiation model first popularized by Fisher and Ury. This approach is preferable as it is adaptable to a variety of conflict situations; it is well-established and builds on the current ADR courses in place. The program, which could appropriately be titled "Advanced Dispute Resolution Skills Practicum", would expand the students' perspectives on the lawyer's role in society in three distinct ways:

First, it...aims at broadening students' views of a typical lawyer's work to include problem solving, transaction facilitation and dispute resolution. Second, it introduces different theories of dispute resolution and increases student's familiarity with alternative dispute resolution processes, their advantages, disadvantages and particular challenges. Third, it promotes critical thinking about lawyer responsibility and ethics, and explores the conflicts between individual interests (both lawyer and client), legal institutional interests and societal interests."

Flowing from these primary learning objectives are several smaller ones. For example, a practicum ADR course would identify the skills needed to participate in different forms of problem solving and dispute resolution. Among these secondary objectives are the following:

[c]onnecting legal analysis to remedies while exploring the limits of legal solutions to client problems; [b]reaking down artificial classifications of legal issues and re-emphasizing the importance of facts in legal analysis; [e]xploring when and how to choose different processes; [and i]ncreasing observation and listening skills"

In sum, a course that allows students to apply their knowledge of interest-based negotiation techniques to real-life disputes would aid law students in the transition from the perception of lawyer as advocate to include lawyer as problem solver, transaction facilitator and dispute resolver. In addition, it would demonstrate that rather than lawyers hindering the process of conflict resolution, they can be effective participants in mediation

### **5) How Law Schools Have Incorporated ADR Into Their Curricula**

Over 200 schools in North America have some form of campus mediation program in place. This section will focus on the programs in place at Canadian law schools. A survey of the programs at several other law schools across Canada places U of T law school's course offerings at the lower end of the spectrum. Moreover, when the CBA recommendations are applied to the program currently in place here at the University of Toronto Faculty of Law, it seems that the course offerings in the area of ADR , consisting of two upper-year seminar courses, one on Negotiation and one on Alternative Dispute Resolution, both of which may only be taken by a handful of students, is insufficient to achieve the overarching goal of imparting ADR knowledge and skills to students entering the legal profession. Offering a practicum course on ADR would provide students with hands-on experience, thereby enhancing the current program by enabling students to apply their knowledge on interest-based conflict resolution.

The University of Ottawa, in addition to offering ADR and negotiation courses as elective, upper-year, limited enrolment seminars, piloted a First Year Conflict Resolution Program in 1995. This program integrates dispute resolution materials into the substantive course content in all first year contracts and property classes in a one-week mediation unit. Coached by practitioners, students engage in interactive learning concerning the preparation process and the role of lawyers in such processes. This is one innovative way that ADR may be integrated into the curriculum. The existence of such a program and its success at University of Ottawa indicates the importance placed on ADR education and its integral role in that school's curriculum.

Dispute resolution training programs are in place at several other Canadian law schools, which are helping to meet the growing demand for ADR training. For example, Osgoode Hall Law School's Continuing Legal Education program (CLE) offers a variety of workshops ranging from one to five days in length, providing the opportunity to begin with some basic training and then progress to advanced

workshops. From there, students can move on to even more advanced "industry-specific" programs that teach ADR in insurance disputes, labour disputes, construction disputes, etc. For those who wish to study ADR more intensely, Osgoode offers a two-year part-time LL.M. in the subject.

The University of Windsor's law faculty grants certificates to those who take ADR courses taught by the practitioners from the Toronto firm Stitt Feld Handy Houston. The University of Windsor also houses the Dispute Resolution Institute of North America, still in its developmental stages, which "will provide services, education and research to companies or other corporations interested in avoiding, managing or settling disputes." Finally, the Windsor-Essex Mediation Centre's three year pilot project received wide acclaim in the realm of small claims court mediation, and has led to similar pilot projects emerging elsewhere in Canada.

Queen's University invites Kingston-area practitioners to the law school during the term to attend ADR classes along with law students. The University of Western Ontario Faculty of Law enjoys an affiliation with the Dispute Resolution Centre ("DRC"), established and operated as a "Practical Program" by the faculty's students.

Outside of Ontario, numerous law schools offer courses on dispute resolution which include a practical component. For example, Dalhousie instituted a Negotiation and Conflict Management Programme at its law school. The University of Saskatchewan offers several mediation and negotiation programs as part of its curriculum. Moreover, as Saskatchewan has introduced mediation as a formal step in the litigation process, the Saskatchewan bar admissions course has responded by incorporating a mediation component, thereby ensuring that new lawyers have, at a minimum, some exposure to the process. Finally, the University of Victoria, in addition to integrating dispute resolution concepts into many regular courses, has established an Institute for Dispute Resolution (IDR). IDR is an interdisciplinary research and education centre which provides opportunities for dispute resolution, education and professional development. As well, it advises government and private parties on methods of resolving disputes in Canada and internationally.

This brief review illustrates that there are a plethora of interest-based conflict resolution programs which permeate the legal education system across the country. The University of Toronto's Faculty of Law lags behind. While U of T does have a "Program on Conflict Management and Negotiation", which commenced a Certificate in Continuing Studies in Dispute Resolution in the fall of 1996, this program is not affiliated with the law school. Thus, at present, there is little opportunity for U of T law students to gain practical exposure by participating in the mediation and negotiation of actual disputes.

## **II. NEGOTIATION PREPARATION**

In order to achieve our goal of expanding the ADR curriculum at the University of Toronto Faculty of Law, and specifically to add a practical mediation component, it is necessary to work in conjunction with the school administration. This is important because the administration is the body best able to give long term support to such a program. While it may be possible for us to arrange practical experience on our own, it would not be possible to have a more comprehensive ADR curriculum without faculty support, including planning and ideas, resources, and supervision. This section focuses on how we plan to broach this subject with the law school administration and our preparations for meeting with the Associate Dean.

The issue of expanding the ADR curriculum has arisen as a result of our having taken the ADR course

offered by Stitt, Feld, Handy, Houston at the law school. Addressing this idea now may be auspicious because the faculty of law is engaged in curriculum reform as part of an internal review of the law school. It is our hope that our suggestions in the area of increased ADR instruction and practice will be welcomed in view of the overarching changes being made.

In setting up the negotiation we first had to determine the appropriate administrative person with whom to meet. Assistant Dean Lois Chiang informed us that we should contact Associate Dean Mayo Moran.

### **1) Different Problem Solving Processes**

In approaching the administration we had to determine what type of process to adopt and, within that process, the actual steps that should be taken to best make our point. Some examples of processes that might be adopted include power-based, rights-based and interest-based.

In power based processes, the weaker party is forced to comply with the will of the person holding power because of the threat of negative consequences. Power is a complex phenomenon in that it shifts from situation to situation and issue to issue and may also be tied to systemic social problems. In the current situation, it is clear that, as students, we do not have the power to coerce the administration to implement an ADR program of our choosing. While there may be some steps that could be taken to exert student power (such as rallying student support internally or threatening non-constructive measures such as negative publicity for the school or some type of student disobedience) these methods would be ineffective in the long-run because they would destroy the relationship between students and administration fundamental to the healthy functioning of the school.

Rights based processes revolve around determining who is right and in whose favour the conflict or decision should be settled. In the present case it is difficult to know whether or not there is a right answer. It would seem that there are a variety of possible solutions that would meet our goals of increasing student participation in hands-on ADR work. Rights based solutions are generally "all-or-nothing" approaches, and this is not a situation where that type of solution would be in order. Further, in rights based systems the decision is made by an objective third party. This would not be effective with this issue because the solution must be one that the parties (our student group and the administration) can all agree to as it will take cooperation to implement any new program. Furthermore, as with a power based system, rights based solutions may jeopardize the future relationship of the parties.

In the third type of system, the interest based approach, the focus is on the goals, wants and needs of the participants rather than on their rights or the power dynamic in the relationship. Interest based systems generally promote the importance of the relationship between the parties and emphasize party ownership of the process. This is reflected both by the direct participation of the parties and by cooperative problem solving. While it is important that parties work together, it should be noted that this is not a process that takes the problem less seriously or where parties are encouraged to compromise their interests. The participants are urged to "be soft on the people, hard on the problem". Thus, the goal is to find solutions that satisfy everyone's interests; this requires that the parties come up with creative solutions that may be different from those envisioned at the outset of the process.

### **2) Choosing Interest-Based Problem Solving**

As discussed above, there are a number of reasons to choose interest-based problem solving strategies for this project as opposed to rights based or power based methods. Interest based strategies allow the participants to direct the process and be involved in the decision-making, which is particularly useful when there are a range of solutions to choose from, and a number of decisions that will have to be made

over time. As the implementation of a new ADR practical component will likely take place over the course of a couple of years, it is important that there be a system in place that can be used to resolve issues that arise over that period. As interest-based processes are directed by the participants, it makes it much easier for the parties to solve future problems because they already have a framework for doing so, and can access the process directly.

There are a number of different interest-based methods that may be used in problem solving. The two most common are principled or collaborative negotiation and mediation. Mediation is "facilitated negotiation" where a third party neutral assists the parties in negotiating with each other. As resources are limited and there is as of yet no known difficulty in communication, our group has decided to proceed by way of negotiation. It is the most direct way of communicating and can be used by the parties whenever necessary.

Although negotiation is directed by the participants and can be put into practice quickly, it is necessary to properly prepare in order to be more successful at the bargaining table. Roger Fisher has developed seven elements of principled negotiation, cited by Stitt, that we have decided to put into practice in preparing to negotiate with the administration.

### **3) The Seven Elements of Principled Negotiation**

#### **a) Interests**

Negotiations are often more successful when parties focus on their interests rather than their positions. Nevertheless, parties to negotiation often talk about their *positions* with respect to the issues. These positions represent certain preconceived notions about the appropriate solution to the matter and do not articulate the reasons upon which those positions are based. Identifying *interests*, which are the underlying needs, concerns, goals and fears of each party is often a better way to understand the issues and approach a solution. Parties may have totally incompatible positions, but often their interests are more easily reconciled.

In order to determine what the interests are, it is necessary to ask why a particular position is important. It is also useful to rank one's interests in order to have a better idea of which points cannot be compromised, and whether there are points that may be conceded should the other party have different interests. Further, it is useful to try to determine what the other party's interests are before the negotiation to attempt to foresee both common interests and more difficult issues. Assessing interests will also prove useful at the later stage of the negotiation where the parties attempt to craft a common solution.

Prior to the negotiation session, we identified the following long-term and short-term interests of the Student ADR Group We recognize that we may discover other interests in the process of negotiating:

- More ADR instruction in the future → long term
- Practical ADR experience in the future → long term
- To receive credits for the additional ADR experience → long term
- To add another type of clinic/practical experience to the law school → long term
- To have the opportunity to develop a program with the administration → long term
- To have a fair hearing by the school administration → short term
- To complete our ADR project/paper on time → short term
- To gain negotiation experience through this project → short term

The interests of the law school administration might include the following points:

- To conserve resources and time that are currently devoted to other issues (i.e.: internal review and the investigation of the marks scandal may take priority over implementing an expanded ADR program);
- To provide courses that benefit a wide number of students;
- To keep costs down or not to add significant costs to the school's budget;
- To provide a curriculum that is responsive to student interests and to the requirements of a changing legal profession;
- To provide a high quality curriculum program;
- To continue to be a leader in legal education;
- To provide a diverse curriculum program;
- To satisfy the research interests and expertise of the faculty members; and
- To encourage and support student initiatives and student clinic programs and to ensure the quality of such programs;

It seems clear that there will be some areas in which the administration and the student group have common interests, for example with respect to the quality and diversity of the curriculum offered. The interests may diverge, however, with respect to the timing of this proposed negotiation and the resources available for any proposed changes. Given the other issues that are currently being addressed by the administration, there may be reluctance to discuss this ADR issue at the present time. However, one of our most important interests is completing this paper, which requires that the issue be addressed before the end of the semester. As well, the administration controls the school's resources and may not want to expand the resources spent on ADR at the school even if they support the idea of having more such courses generally. These are issues which will have to be addressed during the negotiation.

### ***b) Alternatives***

Before entering into a negotiation it is necessary to examine the alternatives to reaching a negotiated agreement with the other party. If the parties understand their alternatives it allows them to better evaluate the options arising out of the negotiation. Parties should not only make a list of alternatives, but develop one of these alternatives as the **best alternative to a negotiated agreement (BATNA)**. This is somewhat like a bottom line; the party will not accept any solution that is worse than its BATNA. Mere knowledge of one's BATNA improves one's ability to bargain. Moreover, where a party has a good BATNA, that party will have stronger negotiating power because it knows that it can walk away from the negotiation and still meet many or all of its interests.

The following is a list of alternatives available to the Student ADR Group which we brainstormed as a group prior to the negotiation session:

- To arrange for our own practical ADR experience through an existing program such as Pro Bono Students Canada or with an existing firm.
- To approach other clinics or programs in order to get support for an ADR program.
- To do more work, such as fundraising, rallying student interest, and finding interested faculty members, and then approaching the administration at a later time.
- To exert more pressure on the administration, either through publicity, the Law Society, or the University, should they refuse to take the matter seriously and provide a fair process.
- To establish an ADR club.
- To abandon the idea of more ADR practical experience altogether.

Some possible alternatives available to the administration are as follows:

- To continue with their agenda without dealing with the student concerns but risk losing face within the law school community.
- To postpone dealing with additional ADR curriculum until some point in the future.
- To implement an ADR program without student input or assistance.
- To implement an ADR program through traditional channels without hearing from our group specifically.
- To approach other student groups for input into an extended ADR program (i.e.: Student's Law Society, focus group, townhall meeting).

The Student ADR Group's BATNA is a combination of all of the alternatives, with the exception of abandoning the goal of more ADR instruction and practice. The students may choose to form an ADR club which could then be the vehicle through which future action is taken, such as to set up ADR practical placements, to do fundraising, and to rally more support in the law school community for this project. It is difficult to gage the BATNA for the Faculty of Law in that we are not certain of their interests. We speculate that they may prefer to address curriculum reform through the processes that have already been instituted at the school.

### ***c) Options***

In examining options that may satisfy both parties' interests, it is important to recognize that while advance brainstorming of options is helpful in preparation for a negotiation, it in no way establishes a closed or exhaustive list of options. The Student ADR Group has developed some options as a starting point for discussion of potential short-term and long-term options. We have also conducted an initial assessment of the options that may best reflect our interests and the perceived interests of the administration.

This section is not meant to preclude full and open discussion with the administration. We recognize that the administration may have interests that we have not anticipated, and moreover, will certainly provide very useful insights into options that our group may have overlooked. Given the administration's expertise and breadth of experience, their full involvement in brainstorming options is not only encouraged but will be instrumental in meeting our goals.

### **i) Practical Mediation Programs in North America**

As mentioned above, a large proportion of law faculties in Canada and the United States have incorporated ADR into their curriculum. Many of these faculties also offer their students practical experience in mediation through a variety of means. While an exhaustive discussion of the full variety of these programs is beyond the scope of this paper, we have chosen to highlight 3 successful practical mediation programs at the faculties of law at the University of Windsor, the University of British Columbia, and Harvard University. This discussion will serve to demonstrate how practical mediation programs have been successfully introduced at other law schools, providing ideas for us in generating options as well as assisting us later as objective criteria in evaluating options.

#### ***University of Windsor Program***

Students at the University of Windsor Faculty of Law can acquire practical mediation experience for credit by two means. First, they may participate in the Mediation Clinic Course. This course has a six-week intensive training in mediation followed by a practicum work programme at the University

Mediation Services. Students must attend weekly administrative and intake shifts in addition to conducting mediations that are approved by the clinic.

Second, students can participate in the Osler Internship Program. To do so, students must first complete an ADR course offered at Windsor through Stitt Feld Handy Houston (similar to the ADR course offered at the University of Toronto). Students apply for the internship program in the second term and receive anywhere from three to six "directed research credits". The interns may either work in the university's Mediation Service or on placement in the community with organizations designed to deal with mediation and conflict management.

The Mediation Service clinic is a critical part of the mediation program at the University of Windsor. This free-standing clinic is largely funded by Osler, Hoskin and Harcourt LLP. It receives some funding from the work-study program at the university to pay for student administrative support and from Human Resources and Development Canada to pay for a summer student program. The law school provides the clinic with physical space and computers. The clinic has a part-time director who acts both as a mentor to student-mediators and as office administrator. The coordinator is responsible for marketing the service to the community, with the help of students. Students provide mediation assistance to people who approach the clinic through the service's intake office. Some of the disputes they have mediated are Small Claims Court matters, workplace disputes, or on-campus mediations.

The clinic has an outreach arrangement with the Small Claims Court whereby all claimants filing a Statement of Claim receive a brochure detailing the Mediation Services offered at the University of Windsor. All mediations are conducted with a co-mediator/mentor. The clinic has 12 students for credit in the fall through the Mediation Clinic Course, and 8 students in the spring through the Osler Internship Program.

### ***University of British Columbia Program***

The Faculty of Law at UBC offers a three-year program of courses, seminars and clinical training on dispute resolution alternatives to litigation. In first year, students receive a general introduction to mediation and other forms of dispute resolution during orientation week. First year students can volunteer to role-play as clients in mock exercises where they will be represented by second year students acting as lawyers. They also may attend a one-day mediation session conducted by professionally trained mediators.

In second year, four ADR courses are offered, including Dispute Resolution Appellant/Moot Alternative, Mediation Seminar, Alternative Dispute Resolution Seminar, and Mediation Clinic. Of these courses, the Mediation Clinic provides practical mediation experience with real clients. The course has a pre- or co-requisite of the Dispute Resolution Appellate/Moot Alternative course. The students participate in an intensive three-day workshop followed by mediating actual disputes under the direction of professional mediators. Throughout the course, students regularly track their progress, debrief, and share their experiences with each other and the instructor.

Students in the Mediation Clinic have been slotted into the current mediation program at small claims courts in Vancouver. This program was established by the Mediation Society of British Columbia, whereby professionals pay the Society in order to conduct mediations with parties at the Small Claims Court. The Mediation Clinic director was able to use her connections in order to establish this network between the university clinic and the local courts. Students conduct mediations with a mentor who is a trained mediation professional. The students have had to pay an additional \$150.00 to cover the costs of the mentors and to contribute to the Mediation Society. By the end of the course, students complete four

co-mediations. While this is the first year the clinic course has run at UBC, next year the clinic will accept referrals from a number of sources, both on and off campus, in addition to the current Small Claims court referrals.

### ***Harvard University Program***

The Harvard Mediation Centre was founded in 1981 as a component of the Harvard Law School Program on Negotiation. In 1984, the Harvard Mediation Program became a separate clinical requirement of the Law School's class on mediation. The Mediation Program is now an independent student-based practice organization of the Law School. The overall mission of the Harvard Mediation Program is "to enhance the education of Harvard Law School students by providing multiple and diverse opportunities to learn, practice and teach mediation, and to serve the community by developing, promoting and providing effective mediation services."

The Mediation Program specializes in mediating small claims disputes in local courts. The program has established a strong relationship with the local courts, thus facilitating the mediation training program for the students. The majority of the students at the clinic are volunteers, receiving no credit for their work in the court. The volunteers are scheduled into bi-weekly shifts at the Small Claims Court and are assigned to mediate claims that arise that day in the court. There is a mentor assigned in the court as a liaison between the court staff, the parties and the mediating students. Mentors either co-mediate with students who have limited experience, or observe mediations. As students gain experience, they may manage their own mediations depending on their comfort level.

The clinic is a student organization with a student board, along with significant faculty involvement. Advanced and experienced students conduct the introductory training for volunteers in the clinic. The Mediation Program offers basic training twice every year, and interest far exceeds available space. Only a minority of students at the clinic work there for credit as part of the Mediation course offered at the law school. These students receive one additional credit for their clinical work. Credit students must attend weekly shifts at the court instead of bi-weekly shifts.

### **ii) Options for University of Toronto, Faculty of Law**

The following is a list of possible options for expanding the ADR program at U of T:

- The University could open a Mediation Centre. This centre would not only be the centre for clinical outreach in mediations, but would also be a multidisciplinary centre for faculty research and training.
- The Faculty of Law could forge a bond with the Current University of Toronto Conflict Management Program. This program offers continuing education training in Mediation and Negotiation. There is no practicum component to the training, so one would have to be developed through the program.
- A Mediation Clinic could be opened through the Faculty of Law. The Clinic would be self-standing and student-run, similar to Downtown Legal Services. Mediations could be conducted through the small claims court system (like the Harvard Program).
- In the alternative, a clinic could operate independently of a small claims court program and take mediations that it receives through requests and referrals for mediations at an administrative office (like the Windsor Program).
- Students who want more practical experience could do internships with existing programs or community organizations.
- A connection could be forged with professionals looking for practical mediations to become

professional mediators (either through the Stitt Feld Handy Houston training program or through the University's Conflict Management Program).

- Downtown Legal Services could be expanded to incorporate mediation services, with the help and support of Judith McCormick, the clinic director.
- The Faculty of Law could offer a course for credit with a clinical component, with ADR training provided in an intensive format and students finding their own mediations to conduct.
- The current ADR course offered at the faculty of law could have an add-on credit component for clinical mediations.
- Students could do a directed research to gain practical experience in conducting mediations, with a paper requirement (describing the preparation and debrief for the mediations).
- Students could seek out a Pro-bono placement that offers some mediation experience.

### **iii) Assessment of the Options**

Given all the possible options listed above, the school must consider which option will best meet both the needs of the school and the interested students. Due to resource and time constraints in developing a program that is the best suited for students and the law school, it is necessary to separate the options into short-term and long-term possibilities.

In the short-term, the Student ADR Group wishes to achieve some practical experience in the next year. In the long-term, a more permanent clinical option should be available to students. To accomplish these twin goals, the Student ADR Group proposes to run a pilot mediation clinical program in the next year.

#### ***Short-term Pilot Project***

A short-term pilot project will give us the opportunity to acquire practical mediation experience while at the same time testing out the possible ways of setting up a long-term program. The short-term project may require a faculty advisor, some limited funding (possibly through a law firm that has ADR connections), consideration of credit options, some refresher mediation training, and a mentor to supervise the mediations.

The Student ADR Group proposes to accomplish the short-term goal of acquiring practical mediation experience through a directed research in practical mediation. We propose to work with the co-operation and aid of Judith McCormick at Downtown Legal Services. Judith McCormick has expressed her keen interest in becoming involved in the project and has pledged her personal support and the support of Downtown Legal Services.

Perhaps the biggest hurdle in gaining practical experience conducting mediations-will be finding the mediations. However, we have explored many options, including investigating the potential of a connection with the small claims courts in Toronto, forging a connection with professionals looking for mediation experience, offering our services to on-campus student conflicts in student residences, and being referred mediations by Downtown Legal Services or Enterprise Legal Services.

The next challenge would be to find a mentor who can supervise our mediations. We will explore the possibility of recruiting ADR professionals or mediators in training. This will largely depend on the availability of funding in the next year. In addition, Lisa Feld, of Stitt Feld Handy Houston, has expressed her willingness and interest in helping with this pilot project in whatever manner is necessary.

### ***Long-term proposal***

Given the resource constraints at the law school and the crucial importance of administrative involvement in establishing a long-term mediation program at the law school, the Student ADR Group determined that it was impractical to propose any preferable long-term option. As discussed above, there are many options available for the incorporation of a long-term practical mediation program. Of crucial importance in assessing the long-term options is consideration of and consultation with all the interested stakeholders. Consequently, at this stage in the process, the Student ADR Group is only proposing that some type of more permanent practical mediation program be adopted by the law school.

#### ***d) Legitimacy***

Legitimacy refers to the principle of resolving conflicts by evaluating the options according to objective criteria. This prevents parties from choosing the options that are already personal favourites and instead requires that the solution meet the interests of the parties in a fair manner. It is also more likely that the parties will be able to agree once they have subjected the options to this kind of analysis. The solution will then be seen to have been chosen as a result of meeting independent criteria, rather than because one party dominated the negotiation and the other felt compelled to acquiesce. The objective criteria that we believe may be effective in evaluating options are as follows:

- To use the programs and experiences at other law schools as examples;
- To consider how proposed options meet the current rules of the university concerning credit hours, clinic set-up, etc.;
- To consider how options meet the resource limitations faced by the school; and
- To consider the integrity of the mediation process and determine which proposals best ensure a high quality process both for participants and the parties to the mediations.

It is likely that the faculty will have other criteria to add, once we meet with them to discuss the project.

#### ***e) Communication***

Good communication requires careful attention to both speaking and listening. As such, it is important to employ interactive listening techniques, which demonstrates to the other party that their ideas are being taken seriously and that their arguments have been understood. Such techniques include paraphrasing and re-framing the ideas of the other party (for example, by repeating the ideas in one's own words), and acknowledging the values underlying the remarks. It is also useful to write down the ideas presented throughout the negotiation, perhaps on a flip chart, as a point of reference. It is especially important to engage in interactive listening when one party says something contrary to the views of the other.

In addition, communication entails setting ground rules at the outset of the negotiation to ensure familiarity with the negotiation process. This may include rules such as respect for all participants, one person speaking at a time, and no criticisms of the options generated at the brainstorming stage.

#### ***f) Relationship***

Before entering the negotiation, it is important to remember that this is a "people process", with a distinct and vital human dynamic. In order to successfully negotiate, the parties need to keep open basic lines of communication. This is dependent upon having some minimum level of a functioning relationship. Furthermore, one must consider both the short-term needs of the relationship to proceed

with the negotiation, and the longer term needs of the relationship after the negotiation is complete. Consequently, where relationships have broken down, the parties would begin by addressing unresolved relationship issues. In this specific negotiation, there is no relationship that needs to be repaired. Instead, it is necessary to build a short-term professional relationship with the Associate Dean while negotiating. In the long-term, the relationship interest at stake is the ongoing working relationship between the Student ADR Group and the administration, as well as the more general student-administration relationship outside of the negotiation. Maintaining or improving this relationship is important to the learning environment and comfort of all members of the law school community. We must therefore emphasize professionalism and mutual respect to fulfill our aim of leaving the meeting with credibility and fostering further communication and commitment on this issue.

### ***g) Commitment***

A commitment to any option presented in the negotiation should come at the end of the negotiation, and only if the deal arrived at is better than the parties' respective BATNAs. In our case, we have decided that the level of commitment we prefer is an agreement to move forward, rather than actually committing to a specific plan. Before concluding the negotiation session, then, we would like to have an action plan in place, which may include an agreement to meet again at a later date, to make additional contacts, or to obtain further information on the subject.

## **III. The Debrief**

### **1) Debrief of the Negotiation**

#### ***a) Introduction***

After over a month of preparation, our group was finally prepared to meet with the administration to negotiate an introduction of a practical component to ADR at the law school. The day before the meeting, we met to do a run-through of the negotiation. This was helpful, as it highlighted some of the potentially difficult parts of the negotiation such as the transition from generating options and objective criteria to actually applying the objective criteria to the options.

On the day of the preparation, we were all nervous and excited. We met thirty minutes before the negotiation to prepare our flip-chart and have one last brief meeting before the negotiation. We were all a little nervous that we were over-prepared with our ground rules, agenda, and flip-chart. However, our preparedness also gave us confidence and some security that we would have some control over the process in light of the power differential between the students and the administration.

The meeting with Professor Mayo Moran [hereinafter Moran], began as scheduled. She allowed us to decide the seating arrangement in the room. We chose to sit on the couch and chairs in a circle. This arrangement facilitated open conversation and a sense of equality amongst the parties. Given Rachel's concern over the power imbalance of meeting in her office, the space in her office was quite comfortable and felt relatively neutral.

Moran was open and friendly throughout the meeting. She allowed us to control the agenda and the process of the meeting, which was very helpful to us in facilitating the negotiation. From the beginning of the meeting it was clear that this was not going to be an adversarial process, but rather a discussion with an administration open to student concerns and interests. This tone was maintained throughout the meeting and allowed the negotiation to proceed smoothly and comfortably.

### **b) Setting the Table**

We designated Estée as the facilitator of the negotiation. She began the meeting with an introduction designed to set the table. All of us felt that the emphasis on ground-rules was awkward and a bit condescending given the friendly and unstrained relationship between our group and Moran. Moran lightened the mood a bit by pointing out that the "time out" rule was something she used with her three-year-old son. Perhaps a better way to introduce the ground-rules and the negotiation in general would be to explain that the particular model of negotiation that we were using begins with "setting the table". In this way, Moran may not have felt that we were aiming a discussion of ground-rules at her in particular, but rather we were simply going through the negotiation process.

### **c) Interests**

After the introduction, we moved into a discussion of the parties' interests. Rachel presented this section very well. Moran was particularly good in generating interests. We were all a little surprised that financial resources were not a big concern for the faculty, although it is possible that she was referring to available teaching resources, and not additional funds to support a director or mentor at the clinic. It was helpful to have our interests written out for clarity and to save time. Rachel did an excellent job at engaging in interactive listening to rephrase one of Moran's remarks in order to articulate the underlying interest of addressing student interest with diversity and breadth of courses.

Before we had completed our interest section, we received an unexpected interruption from Dean Daniels. He entered the meeting and inquired about our presentation. He then proceeded to discuss ADR and the school's potential involvement in a practicum. This interruption caught us all off guard. It was awkward for our negotiation process because he had not been in the negotiation from the beginning when we had laid out the agenda and ground-rules for the meeting. He remained in the room for about 10 minutes discussing possible types of mediations. His comments were largely one-sided, whereby he presented his views on how the school might want to get involved in an ADR practicum. Estée felt that his "soliloquy" demonstrated the importance of the facilitator's role. However, she felt intimidated to interrupt him and bring the discussion back on course, both because of his status as Dean and because he was largely unaware of the meeting's process.

Nevertheless, his appearance was helpful in several ways. First, we did a good job of integrating his comments into the discussion by explaining to him that we were interested in generating options and then discussing feasibility rather than presenting a position (he assumed that we would be positional). Second, we incorporated his ideas into the interests and options of the process after he had left. Finally, and more generally, his appearance may have been a windfall for us; it gave us an early chance to engage his interest in our group by introducing him to our interests and our commitment to the project. His remarks demonstrated some enthusiasm for the project which will be beneficial in future meetings with Moran and other administrators (as discussed below). Consequently, the process will likely move forward more smoothly in the future.

### **d) Options**

The Dean's comments led us directly into the options stage. It was difficult to strictly stick to generating options and not move into discussing and evaluating those options. Perhaps this is because of the natural desire to discuss options as they arise, rather than write them down and come back to them later in the process. Additionally, since we did not see ourselves as adversaries in the process, moving to evaluating options did not feel threatening because there was little criticism directed at each other. Consequently, we moved back and forth a bit between brainstorming options and evaluating the options. It was

generally felt that it would have been useful to have the options written out on the flip-chart prior to the meeting and review them with Moran rather than referring to the options included in the proposal we had given her and then trying to generate new ones. She expressed that she thought we had done a very thorough job in our options list. Perhaps this stifled some discussion. In general, however, Moran was very open to our suggestions and she took the time to generate new options and incorporate the Dean's comments into the discussion. She indicated that some of our short-term options, a directed research for instance, would not be too difficult to implement.

#### *e) Objective Criteria*

After generating options, we moved on to the objective criteria phase. The discussion of criteria and generating new objective criteria went smoothly. We also managed to agree on the long-term and short-term divides. We were surprised that Moran was willing to talk about some longer term options for next year such as an affiliation with Downtown Legal Services. Rachel felt that we spent too long laying out the criteria. She suggested that we should have already had these written out so that we could have spent more time applying the criteria to assess the short term options. She felt that because we ran out of time and could not assess the options, the conclusion was longer because we spent time there fleshing out the short-term options with which we wanted to proceed.

Julie, however, was a bit skeptical about even proceeding to the evaluation of the options, knowing we did not have time to do it well. At the same time, she felt that Moran was on board so she really wanted to move through this stage. She was anxious to get a sense of the chances for different options coming to fruition, given that Moran was supportive of our interests. It seemed feasible to evaluate the possible options at this meeting if we had had more time. However, Julie felt that we could have spent one entire hour discussing and going through the evaluation of the different options. Even if we had cut out some time off the objective criteria, we still would have done short shrift to the crucial importance of evaluating the options. This is where a lot of the work needs to take place: not doing a thorough job of really evaluating all the different options, given all the interests at stake, could result in ending up with a less than ideal option. She felt that it was good that we touched on the evaluation, but that all of us had the sense that we needed to meet again to examine all of the options more closely.

#### *f) Wrap-Up of the Negotiation*

The wrap-up was well done and accomplished our goal of leaving the meeting with a commitment to move forward with a plan of action. It did, however, go a bit longer than scheduled. We felt that we got a bit off track when we started talking about what other information we needed. Estée felt that she was too timid when she first introduced that section; she felt a bit nervous asking Moran for a commitment. However, once she realized that we were off track, when Rachel indicated that time was running out, she changed direction by beginning a "To Do" list and changing marker colour. After the meeting, Rachel felt that we needed more structure to the wrap-up by, for example, setting out a mini-agenda for the wrap-up that was more sensitive to the substance and progress of the meeting to that point.

In the end, however, we came up with a good plan of action. Moran took the initiative in going forward by suggesting that she set up a meeting with the Dean, Lois Chiang and Judith McCormack and that she would look into current student demand for the ADR course. We undertook to distribute copies of our proposal along with minutes of the meeting to the other administrators to brief them before she meets with them. As well, we said that we would follow up with her in two weeks to ensure that our information has been received and that a meeting among the administrators has been scheduled. Finally, we agreed to meet again with Moran in mid-May in order that we may keep informed of the progress.

## **g) Conclusion**

Unfortunately, Moran was unable to debrief with us after the meeting, and the debrief meeting scheduled for the next day was cancelled. We sent her an email request for her comments, to which we had not received a response by the completion of this project.

In general, there was a real feeling of teamwork during the negotiation, both in terms of our group supporting each other and Moran's keen interest in working with us. We all felt that we were very well prepared and had thought about all the right things in planning for our discussion with Moran (except the unexpected appearance of the Dean). Again, the fact that we were so well prepared helped to bridge the gap in status between the administration and students. Moran seemed quite happy with the information we had presented her and genuinely interested in moving forward with the implementation of more ADR at the law school. This was an extremely valuable learning experience for all of us. Conducting a real negotiation with the administration was an excellent way for us to use some of the skills we have acquired in ADR and to advance our interests for next year.

## **2) Debrief Of the Project's Process**

### **a) Things We Did Well**

On the whole, our group worked very well together. During the course of our 11 meetings (which lasted on average 2 hours each) and numerous e-mail and telephone correspondences, we showed respect for each other and our opinions and communicated effectively. It seemed that we were equally committed to the project and we all took it very seriously, while at the same time enjoying the process and feeling excited about the potential of seeing our goals met.

The unique subject matter and type of project, involving a practical application of the skills learned in the ADR course rather than simply a traditional research paper, provided extra motivation to work well together in order to achieve our goal. To that end, we scheduled breakfast and dinner meetings to make the work more enjoyable, thereby building more team spirit. Perhaps our personal friendship contributed to our work ethic, as we paid close attention to each other's feelings, took turns speaking and made sure that there was equal ownership over the project.

At our very first meeting, we set general deadlines for completing each stage of the project, and we wrote out a general framework for the proposal. This was very helpful in keeping us on track and ensuring that we accomplished each task on time. Moreover, Rachel reminded the group at the beginning of each meeting exactly what had to be done during the meeting, and we ended each meeting with a list of things for each of us to do by our next meeting.

When points of disagreement arose, we tried to uncover the interests underlying the positions we took toward various aspects of the project and debated rationally for our respective choices. For example, we were not sure how much information to give to the Associate Dean before the meeting: Estée felt that we should not give her the entire proposal ahead of time for fear that we would be perceived as too positional, and that the Associate Dean might have come into the meeting with preconceived views. Rachel and Julie, however, felt that giving her the information ahead of time may involve her more in the process, save time explaining the background research and help generate more options at the negotiation. Ultimately we chose to give the Associate Dean more information before the meeting, emphasizing in our letter to her that our suggestions were merely options for consideration and that we welcomed the participation of the administration in generating more options.

We faced similar issues in trying to decide whether to give Moran our agenda for the meeting beforehand, rather than presenting it to her at the beginning of the meeting, and in deciding how much information should be written down on the flip-chart before the meeting. In both instances, we resolved the problem by returning to a discussion of the goal of our project. Once we agreed that our interest was not to get a full commitment from the administration, but rather to have them agree to move forward and look into the possibility of developing a practicum course, the problems seemed to resolve themselves. After discussing the advantages and disadvantages of each position, we came to a consensus, deciding not to give her the agenda until the start of the meeting, and choosing to write some things on the flip-chart beforehand, and other things during the meeting.

We were quite resourceful in terms of getting the information we needed and using our different sources effectively, through e-mail, the Internet, contacts at different law schools, and conventional written materials. Our meeting with Lisa Feld midway through the project, on Saturday, March 17, 2001, was very helpful both in reinforcing that we were on the right track and in working out the smaller issues which we had yet to address.

We divided up the work equally among the three of us throughout the project and at the negotiation session. While the major decisions were made as a group, some issues were ultimately decided by the person to whom that task was assigned. For example, after Julie researched the programs in place at the various law schools in North America, Rachel and Estée deferred to her decision concerning which three schools to profile in the background information and serve as one element of the objective criteria against which to assess the viable options for U of T.

Although each section was typed by the person in charge of that area, our editing process ensured that the project was a collaborative team effort. Each section was e-mailed to one of the other two people, who then edited it and sent it on to the third person to add her comments. Rather than simply e-mailing the twice-edited version back to the original member, after each section had been edited by all members of the group we met together and made the changes as a group to ensure cohesiveness. This was a good learning experience and helped pull the paper together, in terms of both quality and style, so that it reads as one paper. As a result, all three of us were familiar with all sections of the proposal.

Our overall organization and preparation seemed to pay off in the negotiation session with the Associate Dean; we were able to assist each other in conveying information and also had confidence in one another's knowledge about the project and ability to communicate effectively.

### ***b) Things To Do Differently***

While our group worked well and efficiently together, we did face some challenges. For example, it was often difficult to concur on agreeable meeting times on account of our differing and busy schedules. In hindsight, we were not sure whether we needed to have met as many times as we did. While each meeting was very useful and we cannot point to any one meeting that was superfluous, it was extremely time-consuming to continually meet and discuss the project.

On a similar note, we found the editing process frustrating and time-consuming. Even though each section had been edited ahead of time by each member of the group, it still took us many hours to edit it as a group. Perhaps we could have sacrificed the group aspect and cohesiveness of the paper for the sake of time and expediency; the challenge is finding the right balance. We also should have avoided tedious and lengthy discussions about grammatical details.

In general, we did not find the dynamic of "two against one" working against us, since we tended to agree, or were able to work to agreement, on most aspects of the project. At one meeting, however, when we were discussing where the negotiation should take place, Rachel suggested that we meet the Associate Dean in a neutral place (such as a boardroom or meeting room in the library) rather than in her office. Rachel felt that since we were meeting with a person in authority, it might soften the power imbalance by meeting in a neutral place. Julie and Estée disagreed, claiming that it would not pose a problem to meet in the Associate Dean's office and may even appear more confrontational if we suggested a different place. They were also concerned that it might not be possible to find another private and comfortable location at the school. Rachel felt that she was being attacked by the other members of the group and that they were too quickly dismissing her concern. This sentiment was perhaps made stronger by the fact that Julie and Estée were seated across from Rachel during the meeting. This reinforces the importance of presenting the underlying interests rather than positions, as well as the importance of "setting the table". As a result of this situation, we made sure that we sat in a circle at the negotiation session in the Associate Dean's office.

At the very beginning, our goal was to have a concrete commitment by the completion of this project, setting out precisely what type of ADR practical component the administration agreed to implement at U of T. Early on in the project, we realized that we had to re-evaluate this position in light of other interests, particularly the thorough attention to the process of implementation itself. Since that initial goal was impractical in the short time that we had, we shifted our goal to achieving some commitment to study this proposal further by the administration. Ultimately, we did accomplish what we had wanted, which is to move forward with our proposal along with the law school administration.

### *c) Conclusion*

This was a very positive group-work experience for all of us. We were a bit wary at the beginning because of our negative experiences with group projects in the past, due either to lazy group members or to problems resolving differences of opinions. It is clear from this project that attention to the process of completing the project and the maintenance of the relationships of the participants can help in overcoming some types of group-work problems. While consideration for the details of the process is crucial to the success of group work, it is difficult to strike the right balance between meetings and discussion of the process with time-efficiency. Overall, we have learned more about ADR simply by trying to implement the various techniques of interest-based problem solving, such as interactive listening and considering interests rather than positions, in our own group process.