

ADR 2.0

Kluwer Mediation Blog

December 1, 2013

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Please refer to this post as: Erin Gleason Alvarez, 'ADR 2.0', Kluwer Mediation Blog, December 1 2013, <http://mediationblog.kluwerarbitration.com/2013/12/01/adr-2-0/>

This fall, I taught a course on "Managing Litigation for Corporations" at the Straus Institute. The following post is a summary of some insights that came out of the experience. I felt that this was important to share with you, as it evidences attitudes of those about to enter the field and the challenges in ADR today.

The Straus class was comprised of 19 students – roughly half pursuing their J.D., a handful of MBA students and a few more hailing from the LLM program. It was a diverse group, in terms of gender, race, cultural background, age and experience. This made for tremendous conversation, and certainly an inspiring learning experience for their professor.

As a springboard for discussion, the class was asked to read Michael Leathes' "The Future of ADR in 2020." While Michael's assessment of the "good, bad and ugly" in ADR today is much more optimistic than mine, his points did provide fuel for a series of interesting debates in class. Here is a short list of the issues that were most fascinating to this group of students.

1. ODR: Roughly fifty percent of the final papers were devoted to Online Dispute Resolution (ODR) – what works, what does not, how to fix it and – most interesting – why it's actually better than the face to face sessions we love so much.

2. Regulation: The opaque world in which mediators and arbitrators operate is intolerable. The lack of accreditation, standards, and ratings for neutrals was somewhat appalling to the group.

3. Data Analysis: Tacit acceptance of ADR as naturally beneficial is unproductive. Our discussion on data-driven decision-making processes was probably the most engaging topic of the class.

4. ADR Clauses: The development of tailored dispute resolution clauses to promote better results was accepted by the group as an important and necessary endeavor. This stands, interestingly, in direct contradiction with a seminar that I attended earlier in the year, where nearly every member of the panel seemed to decry the step clause as tool of the apocalypse.

The students are on the right track. It is obvious that ADR will not be impervious to technology in a world that thrives on Facebook, FaceTime, and Twitter. The mediation and arbitration communities should finally realize that if self-regulation does not develop in a quick and robust manner, external regulation will prevail, and likely to their detriment. Moreover, we can chat all day about the benefits of mediation, but what quantitative factors tell us that it is a success? And finally, a world that sees ADR clauses as those lifted from websites, and rely solely on one process, is generally not one that interests me.

While, as Michael's article explains, there is a lot of good in the field of ADR today, we have a way to go.