

**Cavenagh Preface**

**LITIGATION**

- money leveraged
- time years to resolution  
distraction from main tasks
- risk viewpoint of decision maker

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**ADR advantages**

- rapid speed favors who
- private law as a public good
- predictable variance in viewpoint
- party-driven constrained optimization

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**TYPES OF ADR**

- internal  
v.  
external
- facilitative  
v.  
adjudicative

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**Cavenagh Foreword**

90%+ litigation settles before trial  
most in the week before trial

style of ADR v. style of litigation

- cultural habits
- zero sum v. win-win
- set of feasible solutions
- cash only
- price v. cost
- product
- emotion

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**Cavenagh CHAPTER 1**

Start with the Adv. Bus. Law Jurisprudence Slides.

American Civil Litigation

- pre-trial
- trial
- post-trial

- money
- incentives for action, but which?
- time
- past v. future production
- risk
- business relationships

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**American Civil Litigation**

- pre-trial
- investigation
- legal counsel
- complaint
- answer
- reply
- discovery
- expert witnesses
- dispositive motions
- trial preparation
- trial
- post-trial

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**American Civil Litigation**  
pre-trial  
trial  
jury selection or *voir dire*  
opening statements  
plaintiff's case in chief  
cross examination  
defendant's case in chief  
cross examination  
closing arguments  
jury deliberations  
post-trial

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**American Civil Litigation**  
pre-trial  
trial  
post-trial  
motion for judgement notwithstanding the verdict  
appeal  
perfection or enforcement of judgement

Civil Litigation  
due process  
notice and hearing  
both proportional to the interest involved  
money, time, and risk

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**Alternative Dispute Resolution Techniques**  
Negotiation  
Mediation  
Mini-trials  
Summary Jury Trial  
Arbitration  
mediation-arbitration  
Private Judging

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**Alternative Dispute Resolution Techniques**

**Negotiation**

parties alone  
no coercion  
with or without lawyers

**Mediation**

parties with **facilitation**  
no coercion  
with or without lawyers

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**Alternative Dispute Resolution Techniques**

**Mini-trials**

blend negotiation,  
mediation, & arbitration  
semi-formal presentation  
to decision makers  
**limited discovery**  
mediation by presiding officer  
voluntary and private

**Summary Jury Trial**

**discovery**  
mock trial w/o jury's knowledge  
negotiate after jury verdict

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**Alternative Dispute Resolution Techniques**

**Arbitration**

private version of public trial  
binding or non-binding  
exact regulations of procedures

**mediation-arbitration**  
same neutral, two roles

**Private Judging**

hire a retired judge  
just like a public trial  
saving in time  
knowledgeable judge, no jury

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**Advantages of Alternative Dispute Resolution**

- speed
- cost
- individually tailored outcomes
- control
- confidentiality
- flexibility
- internationalization

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**Advantages of Alternative Dispute Resolution**

- speed
  - no wait service
  - assumes a crowded docket
- fewer procedural delays
- cost
  - time in preparation
  - fewer expert witnesses
  - no ignorant jury
- limited discovery
  - can get away with a lie
- individually tailored outcomes
  - cash v. creative solutions
  - easier to preserve relationships

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**Advantages of Alternative Dispute Resolution**

- control
  - lawyers v. clients
  - third party decision maker
- confidentiality
  - public relations
  - preserve trade secrets
  - no precedence
  - narrow impact v. broad impact
  - favoritism
- flexibility
  - parties sculpt process and remedy
  - according to their view of proportionality
- internationalization
  - jurisdiction and reasonable expectations

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**Disadvantages of Alternative Dispute Resolution**

- due process
- equal protection
- enforcement
- limited public access
- regulation of ADR

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**Disadvantages of Alternative Dispute Resolution**

- due process
  - who is acting?
    - private v. public
  - reasonable expectations
    - duress
    - mistake
    - fraud
- equal protection
  - equal law for rich and poor
- enforcement
  - courts will enforce
    - manifest disregard for the law
  - parties less likely to contest enforcement

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**Disadvantages of Alternative Dispute Resolution**

- limited public access
  - circumvent public interest
  - hide wrong doing
- no precedence
  - increases costs of recovery
- regulation of ADR
  - only arbitration well regulated
  - practitioners can easily abuse public

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**Designing for Business Dispute Resolution**  
planning  
implementation

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**Designing for Business Dispute Resolution**  
planning  
predict the problems  
assess the procedural risks  
quantify the desired outcomes  
allocate resources for success  
formalize program goals and polices  
seek multi-level support for the program

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**Designing for Business Dispute Resolution**  
implementation  
require rigorous  
and systematic case evaluation  
condition advancement on participation  
train key players extensively  
construct effective methods  
of program evaluation  
evolve the program to improve outcomes

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