Whose Job Is It Anyway? Preparing Arbitrators for Consumer Dispute Resolution Programs

By David B. Lipsky, Rocco M. Scanza, Mary Newhart, and Richard D. Fincher

In many respects, we have entered into a golden era in the evolution and study of conflict resolution. One of the most obvious examples of this new era is the significant growth of conflict resolution programs in institutions of higher education over the past thirty years. The purpose of this article is to examine the current state of university and law school conflict resolution programs. We also offer some conclusions and recommendations for addressing what we believe to be the critically important role academia can and should play in training arbitrators.

Our review of academic programs suggests that the array of offerings has grown substantially and includes credit courses, clinics, degree programs, and certificates in conflict resolution. At our own institution, Cornell University, the response by our student body to opportunities for studying conflict resolution has overwhelmed our current capacity to meet their needs and interests.

The Growth of Arbitration

This growth of interest in conflict resolution programs and offerings coincides with an extraordinary rise in the use of arbitration in various dispute arenas. The spread of mandatory arbitration in consumer, employment, and other types of disputes, accounts for most of the overall increase in the use of arbitration. One may surmise that a noteworthy part of the increase in academic interest in the study of conflict resolution is a direct response to the increased use of mandatory arbitration. As we document below, however, when we conducted a survey of certificate programs in conflict resolution, we discovered that the balance of offerings in these programs tilted heavily in the direction of mediation, rather than arbitration. Indeed, many

institutions have developed programs of remarkable depth for the study and practice of mediation in a wide variety of contexts. And a number of these programs open their doors to practicing lawyers and other professionals who wish to learn more about the practical aspects of mediation. Accordingly, many individuals who seek to establish or expand a practice in mediation look to academic institutions to meet their training and educational needs. Notwithstanding this array of opportunities in mediation, we found dramatically fewer opportunities in most of the same certificate programs for the study of arbitration and even less interest in providing training to prepare individuals to serve as arbitrators in domestic consumer disputes.

During the last two decades, arbitration's popularity continued to grow. As Thomas Stipanowich reports in his 2004 article, "ADR and the 'Vanishing Trial'," in the *Journal of Empirical Legal Studies*, "between 1993 and 2002 the overall AAA caseload grew from 63,171 to 230,258—a 264 percent increase in annual filings during the period." The nature of arbitration also has changed in several respects in recent decades. For example, in the past, the use of arbitration was largely confined to two domains, namely, commercial transactions and labor-management relations. But in recent years, its use has expanded into other areas, including consumer disputes. Also, traditionally parties in a dispute voluntarily elected to use arbitration; in other words one party could not force another party in the dispute to use arbitration. Today, the use of mandatory arbitration, particularly in consumer and employment disputes, has become more significant than voluntary arbitration.

Consumer Arbitration

Consumers may not fully realize the extent to which they might be subject to arbitration if they have a dispute with sellers over their everyday purchases. In the book, Arbitration Law in

America, published in 2005 by Cambridge, Jean Sternlight writes, “Examining the decisions in reported cases, one can see that arbitration soon began to be mandated by a broad range of companies including financial institutions (as to personal accounts, house and car loans, payday loans, and credit cards); service providers (termite exterminators, gymnasiums, telephone companies, tax preparers); and sellers of goods (mobile homes, computers, eBay).”

Many consumer disputes involve relatively small monetary claims. Consumers filing these claims may not have the financial resources to retain skilled attorneys or to pay the standard rates charged by the AAA, JAMS, the National Arbitration Forum, and other providers. The best-known providers are sensitive to these realties and therefore have developed fee policies that provide for lower rates than they would charge for other types of claims. These organizations also offer mediation services as an option the parties can use prior to arbitration.

The use of mandatory arbitration to resolve consumer disputes has been controversial. Critics point out that consumers may not have the option of refusing to sign a pre-dispute arbitration clause when they purchase a product or service. When a consumer signs a warranty, a purchase agreement, or a lease he or she may not realize the agreement contains a mandatory arbitration provision. The courts, however, have generally not considered such agreements to be contracts of adhesion, which leads critics to raise concerns about whether consumer arbitration provides a level playing field. Not surprisingly, scholars have devoted a considerable amount of attention to issues of equity and due process in consumer arbitration. But universities and law schools have devoted much less attention to the qualifications, training, and evaluation of arbitrators.

University and Law School Programs in Conflict Resolution

We examined a variety of sources, including the *ABA Directory of Law School Dispute Resolution Courses and Programs*, an online directory maintained by the University of Oregon School of Law, and website descriptions of conflict resolution programs, to identify the law schools and universities that offer certificate programs in conflict resolution. We found 38 such programs. The majority of these programs are offered by law schools (34 percent) and graduate schools (32 percent). Additionally, eight programs are offered through continuing education or extension divisions and four by undergraduate colleges; one is a joint offering by an undergraduate and graduate school. Many law school programs are open only to law school students, and similarly other certificate programs often limit enrollment to students in their degree programs. For example, 77 percent of the law school certificate programs limit enrollment to their own degree students.

Principal Findings

Minimum credit requirements for the certificate programs average 19 credit hours/units, with a range between 12 and 42 credit hours. A large majority of the certificate programs list their core course requirements, but some do not. Across all the programs that list their requirements, there are a total of 143 courses.

- The most common core course requirement is mediation (28 of 143 courses), followed by negotiation (23 of 143 courses).
- Only eight courses in arbitration are included in the core certificate course requirements, about five percent of all core course requirements. Six of the eight arbitration courses are in the 13 law school programs, and only two of the other 25 certificate programs require

arbitration, making it highly unlikely that students in non-law certificate programs have an opportunity to take a course in arbitration.

- Only three courses on evidence are included in the core certificate course requirements, only two percent of all core course requirements. The three courses are included in certificate programs offered by law schools.
- None of the certificate programs requires a course in U.S. consumer arbitration. In fact, we discovered that only two of the law schools we examined offer a semester-long academic course on domestic consumer arbitration.
- Non-law graduate and undergraduate programs are more likely to include courses on theoretical concepts, cultural and peace studies, facilitation, and communication, and to require internships. Certificate programs designed for working professionals focus heavily on negotiation and mediation skill building.
- Fewer than three percent of the courses concentrate on the study of ethical issues in the dispute resolution process, despite the fact that ethical issues are always a critical consideration in the process.
- Several of the certificate programs provide degree students with the opportunity to practice their skills in real-life settings. Law schools often include clinic and practicum requirements, which provide direct services to clients. Internships are often required by graduate and undergraduate students in certificate programs.

Additional Arbitration Course Offerings

After we discovered that very few certificate programs require a course on arbitration, we wondered whether arbitration courses are offered in the degree programs at these institutions.

We searched the institutions' online course catalogs for any courses that might be offered on arbitration generally or domestic consumer or commercial arbitration specifically. Of the 38 institutions we examined, 17, or 45 percent, offer a semester-long course in arbitration; 11 of these institutions were law schools. Of the 13 law schools we examined in our study, only 2, or 15 percent, offer a course in domestic consumer or commercial arbitration. Our findings are nearly identical to the findings of a 2001 survey conducted by Thomas Charbonneau, then at the Tulane Arbitration Institute. Carbonneau's findings in "Resource, Teaching Arbitration in US Law Schools," published in the August 2001 issue of *World Arbitration & Mediation Report*, showed that only 15 or 19 percent of the 80 law schools he surveyed offered courses in domestic consumer or commercial arbitration.

Charbonneau called on academic institutions to switch focus from mediation to arbitration: "The survey demonstrates that the teaching of arbitration in U.S. law schools may not have kept up with the subject area's doctrinal development or its role in law practice. Academic institutions may have chosen to endorse ADR by espousing mediation primarily, while the U.S. Supreme Court has created an 'emphatic federal policy in support of arbitration.' It is time for academic institutions to respond to the professional needs that have been created by the Court in the area of arbitration." It is clear, based on our study, that law schools have not met Charbonneau's challenge. The certificate programs we examined favor courses in mediation and negotiation. Few opportunities exist for JD, graduate and undergraduate students to study arbitration and even fewer for professionals to take training courses in arbitration.

Discussion

In their study, "Mandatory Arbitration 'Volunteering' to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, published in *Law & Contemporary Problems*, Winter/Spring, 2004, Linda Demaine and Deborah Hensler found that 57 of the 161 consumer contracts they examined contained an arbitration clause. The authors obtained 52 of these clauses and examined their features. They discovered that only "eight of the fifty-two clauses (15.4%) specify the arbitrators' qualifications." The authors note, "These clauses require that the arbitrators be retired judges or practicing lawyers, often with a stated minimum number of years of experience in law generally or in the area of law governing the dispute." Interestingly, no apparent reference is made in these clauses to training requirements for the arbitrators even though it is widely understood that the success of any arbitration depends heavily on the qualifications and skills of the arbitrator.

The major providers generally require that only members of their panels are eligible to serve in cases they administer. The AAA has long offered its own panel members a variety of arbitration and mediation training programs. In the securities field, the Financial Industry Regulatory Authority (FINRA), which administers the industry's arbitration program, offers courses in arbitration and mediation. However, neither the National Arbitration Forum nor JAMS make any reference to any training programs or requirements on their websites. It appears that the providers' record of offering arbitration training is mixed, at best.

Why do universities and law schools offer so few courses on arbitration? We believe the answer is a complex one, which deserves a fuller discussion than we can provide here. However, we believe it is evident that the absence of arbitrator training programs is at least partly the result of the difficulties novice arbitrators have in gaining admission to provider rosters. Although, it is

also difficult for new mediators to get case assignments, there are many more opportunities for mediators to do pro bono work than there are for arbitrators. Even if young arbitrators are admitted to these rosters, they are unlikely to be selected by the parties in a dispute, who almost always prefer veteran arbitrators. The lack of a link between training and professional opportunities is obviously a deterrent to the development of training programs. However, the Scheinman Institute on Conflict Resolution at Cornell University firmly believes that those linkages can be established, and it is working on initiatives to achieve that objective. Establishing partnerships between university and law school programs and the principal providers, we believe, is one of the important keys to the development of additional training programs.

Recommendations

In light of the growing importance of consumer arbitration and our findings regarding the lack of training and education on the topic, we offer the following recommendations:

1. ***Establish partnerships.*** Academic institutions that have established programs for the study of conflict resolution should deepen their ties to other conflict resolution organizations, including, of course, the Association for Conflict Resolution. Academic programs also should work closely with state and local bar associations, community dispute resolution centers, industry groups, and others who are involved in the promotion and use of arbitration. Fostering closer relationships, and possibly partnerships, with other conflict resolution organizations serves the purpose of establishing networks that can serve the interest of the students in academic training programs. Academic institutions also can play the role of conveners by bringing together arbitrators and other practitioners to assess the need for education and training and how that need can be met. This is especially a role most academic institutions can play at the local or regional level.

2. *Offer more arbitration courses, especially on the topic of evidence.* Certificate programs should strive to increase the number of arbitration courses they offer, particularly programs at law schools with faculty capable of teaching such courses. Our findings also suggest a need for more courses on evidence. Many non-attorney arbitrators have never taken formal courses in evidence and would benefit from an in-depth exposure not only to the basic principles, but also to the differences between the application of the rules of evidence in an arbitral context and in other types of disputes. The typical response that the "rules of evidence do not apply in arbitration" misses the essential point that the rules can and do provide a useful guide to arbitrators in distinguishing what evidence is relevant and appropriate to consider in deciding a case.

3. *Offer courses on ethics.* Ethical issues surface in all dispute resolution processes, including arbitration. Given the concerns about whether consumer arbitration provides a level playing field, courses on ethics are essential. Certificate programs should include a core course requirement in ethics, rather than hoping that this important topic will be covered in other courses. Arbitrators and other practitioners should be able to look to law schools and universities for training in this critically important aspect of arbitration.

4. *Conduct evaluation and research*. Both proponents and critics of consumer arbitration should agree on at least one critical need: academic institutions can play a vital role in evaluating the efficacy and fairness of consumer arbitration programs. Evaluation by impartial researchers is essential to ensuring that arbitration programs provide the parties with full and fair hearings, decided by ethical, competent, and well-trained arbitrators. Also, the providers would benefit from having the arbitration programs they administer evaluated by independent researchers.

Conclusion

Some dispute resolution practitioners may prefer the use of mediation because it is a voluntary process that relies on the mutual agreement of the parties. They view arbitration as coercive and legalistic, and they may even regard the use of arbitration as a perversion of the values of ADR. These attitudes may help explain the reluctance of some ADR professionals to face the need for additional education and training in arbitration. Although the debate regarding the propriety of arbitration to resolve disputes between corporate parties and consumers continues, what is not debatable is that consumer arbitration is alive and growing. Accordingly, training and educating current and future arbitrators should be considered at least as important as the training and education of mediators. The contributions that universities and law schools can make to evaluating and improving conflict resolution practices generally, and consumer arbitration specifically, can be of vital importance to members of the general public, who are often required to use arbitration to resolve their disputes with the sellers of goods and services.

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Thank you for this well written piece with important insights.

One of our reviewers commented: I find a real resistance to arbitration, and even hybrid approaches like med-arb, in the dispute resolution field. The assumption seems to be that arbitration is coercive and legalistic, and many people are drawn to the conflict resolution field because they aspire to be peacemakers and facilitators, so they're not excited about learning about arbitration. In addition, many mediators presume you need a law degree to be an arbitrator, so they dismiss the possibility out of hand. ADR has focused on "mutual agreement" and voluntary programs for decades, so coming to terms with arbitration can be a struggle.

Please consider adding more on controversies surrounding mandatory pre-dispute arbitration in financial transactions and employment law. We suspect many ADR professionals see this kind of arbitration as a perversion of the values of ADR, and an abuse of the principles of the field. However, the only way to combat the expansion of these abusive programs is to learn about them, so it's another powerful argument for the central assertion of this piece.