ADR

How did we get here?
Increase in court filings

• 1930 -1970
• Increase demand due to increase population, growth in economy, greater regulation, access by women & minorities
• 1970’s
• Expansion of remedies: tort, civil rights, consumer, environmental
• Expanded legal services: legal aid, public interest
• Law seen as agent of change & reform
The Vanishing Trial

* Long term decline in # of federal trials
  1962- 11.5 % of all cases filed terminated in trial
  2004 – 1.7 % of cases terminated in trial
* Similar results in state court where most trials are held
  WHY?
Several Theories

• Concerted effort by those disadvantaged by the increase in litigation.
• “litigation explosion”
• Jaundiced view of legal system fueled by media
• Judges become active “dispute resolvers”
Solution

• Curtail Remedies: “tort reform”
• De-regulate
• Privatize dispute resolution
Resulting Changes

• Case management
• Mediation
• Divert to ADR
• Proliferation of ADR forums & professionals
As a Result the role of courts has changed

• Assume jurisdiction
• Administer paperwork
• Adjudicate pre-trial disputes
• Manage dispute resolution in an orderly way
• Enforce decisions
Other Theories on why there has been a move away from traditional litigation to “alternatives”

• Expense
• Efficiency
• Better results?
EXPENSE

• 1.5% of GNP
• High transaction cost
  – the “lump it” cases
• Denial of access
Adjudication

- Delay and Backlog
- Inability to fashion appropriate remedy
- Expertise needed
Fairness Concerns

• Gallanter- Why the “Haves” come out ahead
• Systemic gender Bias
Non-Financial Burdens

- Emotional costs
- Winner take-all dilemma
Concerns raised by Owen Fiss
Other Concerns

• Bargaining moves from “shadow of law” to “shadow of settlement”
• Judges rely on experience, not authority
• “repeat players” advantaged
The Advocates of ADR Respond

• Relieve Court Congestion
• Enhance Community Involvement
• Facilitate Access to Justice
• Design more effective dispute resolution mechanisms to increase party satisfaction (procedural justice research)
• Reduce pervasive cynicism about lawyers and role of law in society
Menkel-Meadow
Choosing an Appropriate Dispute Resolution Mechanism

- Cost
- Speed
- Privacy
- Precedent
- Relationship
- Need for vindication
- Power Imbalance
- Need for decision on past events
- Need to compel participation/ enforce agreements
- Need to avoid win/lose
- Absence of clear legal entitlements
- Premium on control by disputants
Processes We Will Study

- Interviewing and Counseling
- Negotiation
- Mediation
- Arbitration
- Mini-trial
- Med-Arb
- Reference statutes- “Rent-a Judge”
- Court-connected Processes- ENE, Summary Jury Trial,
Getting Started

- Interviewing Exercise