



THE MAYHEW-HITE REPORT ON DISPUTE RESOLUTION AND THE COURTS

Created by the Program on Dispute Resolution and the Ohio State Journal on Dispute Resolution at the Moritz College of Law and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew

Welcome

The *Ohio State Journal on Dispute Resolution*, in collaboration with the Moritz College of Law's Program on Dispute Resolution, is pleased to bring you Volume 14, Issue 1, of the *Mayhew-Hite Report on Dispute Resolution and the Courts*.

Associate Dean Christopher M. Fairman's unexpected passing on July 22, 2015, sparked a warm conversation within the Moritz College of Law community about his scholarly credentials, exceptional generosity and considerate empathy. Moritz hosts a memorial for Dean Fairman at 4:30 on Monday September 21. This edition of the *Mayhew-Hite Report* is one small effort to preserve and recognize Dean Fairman's legacy.

[Dean Fairman's memorial website](#) is filled with warm reflections from colleagues and former students. Recent graduate Meagan Woodall (Moritz '15) discussed his "phenomenal" appellate advocacy coaching skills. Moritz Professor Joshua Dressler extolled the "enormous" time Dean Fairman spent "caring for his students." Yale Law Professor Daniel Markovits—one of Dean Fairman's former McCallum High School students (Dean Fairman taught high school history prior to attending law school at the University of Texas)—wrote "Mr. Fairman's charisma had extraordinary roots: never in his regard for himself, but always in his deep interest in and regard for his students. To be taught by Mr. Fairman was to be listened to — seriously, intently, steadfastly, critically, and sympathetically." His former McCallum High principal, Penny Miller, added Dean Fairman was an "outstanding, creative, caring, and a team player After observing his teaching, I always left wishing I could stay longer."

To create Volume 14, Issue 1 of the *Mayhew-Hite Report*, we asked several Moritz Program on Dispute Resolution Faculty to contribute a short comment about one aspect of their work with Dean Fairman. First, Professor Ellen Deason shares a memorable story about a jig-saw puzzle Dean Fairman managed to incorporate into civil procedure classes. Professor Josh Stulberg, Professor James Lawrence and Professor Emeritus Nancy Rogers provide different perspectives regarding Dean Fairman's contribution to collaborative law. Finally, Program on Dispute Resolution Director Sarah Cole and Former Langdon Fellow in Dispute Resolution Rishi Batra (now at Texas Tech) both reflect on their relationship with Dean Fairman.

The Missing Piece

Ellen E. Deason^[1]

One of the remarkable things about Chris Fairman was the striking range of subjects on which he published. He made contributions in multiple fields: Civil Procedure (most notably on heightened pleading), First Amendment (his famous work on taboo language), Dispute Resolution (collaborative law, good faith requirements), and Attorney Ethics.

EDITOR'S CORNER



Editor's Note

Hello and welcome to a new year of the Mayhew-Hite Reporter. My name is Kelli Jo Amador, and I am the Mayhew-Hite editor for the upcoming year. We begin this year with a somber, and somewhat unusual, edition of the Mayhew-Hite: a memorial edition honoring the passing of beloved Moritz Professor, Dean Christopher M. Fairman, who left us unexpectedly this past summer. This edition contains not one main ADR article, but contributions from students, colleagues, and peers of Dean Fairman sharing their experiences of his life.

It is my sincere hope that those who knew Dean Fairman will find comfort and joy in reading about Dean Fairman's life and works. I look forward to serving as the Mayhew-Hite reporter editor for the coming year, and encourage those interested to continue reading.

STUDENT SPOTLIGHT

His broad interests were also apparent in his personal life; one way he expressed them was through his penchant for collecting. This enthusiasm was part of what made him such an interesting friend. As we remember and celebrate Chris, I'd like to contribute a few anecdotes about this side of his personality.

Chris collected many things. Part of his devotion to sartorial excellence was apparent in his magnificent collection of silk pocket squares. In stark contrast, he also had an interest in strange anthropological artifacts. I remember his great glee as he once showed me a picture of a shrunken head he had purchased to display in his house. More conventionally, he entertained many with the collection of Supreme Court Justice bobble-head dolls that he kept in his office. We had fun discussing which were the most realistic likenesses and speculating on the meanings of the symbolic items that accompany each doll. And, ever the devoted teacher, he collected things that related to the cases he taught, which was part of his way of making the material memorable for students.

[Read more](#)

Professor Fairman and ADR: Roads Yet to Explore

Joseph B. Stulberg^[1]

To have been a friend of Chris Fairman is to have belonged to a large, non-exclusive group. Each interaction with Chris made one a better person. His loss is profound at multiple levels - and in ways that continue to surprise.

He came to his scholarship in alternative dispute resolution (ADR) grounded in his strong interest in professional responsibility and lawyering. I have to believe that we could have tapped him to combine his recent passion about how words matter with those prior interests that would have led to his helping us gain a better understanding of - and sharpen our practices in - multiple ADR processes. I want to focus on one possible path.

Chris's entry into ADR scholarship targeted collaborative law. In particular, he focused on whether or how it was possible for a lawyer to discharge her professional responsibilities while framing her representation role within the obligations of the participation agreement to which all collaborative law participants, including lawyers, pledge loyalty. Here is Chris's wonderful description of the challenge:

Collaborative law's unique twist is that everyone agrees in advance that the lawyers participate solely for settlement purposes and cannot represent either party in litigation....^[2]

[Read more](#)

Reflections on Professor Chris Fairman

James K. Lawrence^[1]

Professor Fairman constantly made himself accessible, was genuinely interested in my teaching and writing, and was enthusiastically constructive in his advice and counsel. In 2001, for example, I sought his advice on a JDR article on collaborative lawyering. His insights were valuable. Following publication in 2002, Sandra Beckwith, then a U.S. District Court Judge, and Sherri Goran Slovin wrote a critical response to my piece. Chris took up the challenge and wrote a third offering so that the developing research on ethical standards and collaborative lawyering would be widely vented.^[2]



Words From Latino Law Student Association, Past and Present Members

One of the many ways Dean Fairman gave back to the Moritz community and preserved his own cultural heritage, was by serving as the Faculty Advisor for the Latino Law Students Association. Despite his many other commitments, Dean Fairman made it a point to make it to all of the LLSA functions he was invited to—be it a happy hour, an organizational meeting, or a quick lunch at La Plaza. His investment in student diversity enrichment was evident in his genuine desire to know and support each LLSA member. He was always receptive to student voices, and allowed the students to shape the organization in their own vision each year. When he needed to, he gave valuable guidance—he encouraged outreach to LLM students, candidly provided advice on transitions and governance, and suggested networking resources.

Beyond being a wonderful advisor, Dean Fairman's lasting legacy to the organization and its members was his personality. His passion shined through in all he did. He was an animated speaker, but also a deeply receptive listener who enhanced every conversation he entered. He made all students feel welcome and valued, and saw the potential in each of them as well as in the organization itself. Most of all, he cared deeply about every student he worked with and every project he embarked on, and he went above and beyond to support LLSA. Our organization and all of its members—past, present, and future—are better for having Dean Fairman's influence and example. He will be dearly missed.

Chris discerned that our disagreement – a “sharp split in ethical perspective”^[3] – lay “within the context of the larger on-going conversation on the merits of different ethical guidelines for ADR participants.”^[4] The disagreement Chris found in the two articles he reviewed should lead the way to development of separate ethical rules. Chris most kindly noted that I “stop{ped} short of advocating a separate ethical code for collaborative lawyers.”^[5] He concluded: “It is time to don a new hat.”^[6] Our collaboration permitted my early views and those of the developing CL community to jell. My reflection on our interaction serves only to underscore his love of learning, sharing, and collaborating toward improving critical thinking, the ethics of legal practice and our profession.

[Read more](#)

A Legacy of Value “Hats” for “New Heads”: The Scholarly Tenets Implicit in Professor Fairman’s Collaborative Law and Ethics Scholarship

Nancy H. Rogers^[1]

A set of beliefs about how scholars best contribute to improving dispute resolution permeates Professor Chris Fairman’s writings on the shortcomings of applying existing legal ethics rules to the new process of collaborative law. As with so much of what we admire and will dearly miss in Professor Fairman’s teaching, service and life at the Moritz College of Law, his pronouncement and application of this set of scholarly values serves as a legacy that can guide future dispute resolution scholars.

Scholars should endeavor to provide a simple yet precise explanation of even a complex subject. Though an expert in the complexities of both professional responsibility and collaborative law, Professor Fairman described the complicated concepts so that readers could grasp them quickly:

In collaborative law, lawyers encourage the parties to engage in joint problem solving as opposed to a traditional adversarial role. The heart of collaborative law is a written participation agreement where the parties agree not to go to court for resolution of the dispute during the collaborative process. If a party seeks judicial intervention, the agreement requires that counsel for all parties must withdraw from further representation.^[2]

[Read more](#)

Chris Fairman – Friend, Teacher, Scholar

Sarah Cole^[1]

I still cannot believe that Chris is gone. Only days before he passed, Chris and I were working collaboratively on an administrative issue related to the dispute resolution program. When I asked Chris if he had time to discuss the issue, he said, “of course.” He listened and thoughtfully responded to my concerns. He also raised new questions that I had failed to consider. As always, he was an excellent listener who carefully thought through problems until we developed a solution that worked for those involved. Whether working as an administrator or colleague, Chris had an innate capacity to identify and develop viable compromises that addressed the relevant interests.

I also admired his work as a teacher. I was so pleased when he chose to develop

MORITZ ADR LINKS

Moritz Program on Dispute Resolution

Widely regarded as one of the nation’s finest programs in the area of Alternative Dispute Resolution, the Moritz ADR program was established in recognition of the need for future lawyers to be trained in an array of dispute resolution methods beyond litigation, including negotiation, mediation, and arbitration. [[Program Home](#)]

Ohio State Journal on Dispute Resolution

The *Ohio State Journal on Dispute Resolution* (“JDR”) is a student-initiated, student-run publication and is the official law journal of the American Bar Association’s Section on Dispute Resolution. [[JDR Home](#)]

The Caucus

The Caucus is a monthly e-newsletter that highlights the scholarship and accomplishments of the Moritz Program on Dispute Resolution faculty and students. [[The Caucus Home](#)]

Indisputably

Indisputably is a blog operated by law professors from around the United States concentrating on issues involving dispute resolution.

[[Indisputably Home](#)]

a seminar that explored his interest in the intersection of ethics and dispute resolution. The result, "Ethics and ADR", was extraordinarily popular. I have learned in speaking with Chris's students that his knowledge of the topic was unparalleled and his willingness to work with students to develop paper topics and execute their plans was legendary. More than one student from Chris's seminar went on to win our Rogers Prize in Dispute Resolution (given to the student writing the best dispute resolution paper in the law school during a calendar year). In fact, our latest winner, Collin Flake, honed his writing skills in Chris's seminar, penning an article on the ethics of third party funding in arbitration that was immediately snapped up for publication in the American Arbitration Association's Dispute Resolution Journal. Chris was rightfully proud of his student's excellent work.

[Read more](#)

Chris Fairman: A Remembrance

Rishi Batra^[1]

Chris Fairman exemplified what it meant to be a generous mentor and colleague to junior faculty members. In the Fall of 2011 I was in the second year of my Fellowship at Moritz, and going on the hiring market for academics for the first time. I was nervous, since I had heard the words "Wardman Park" and "hot seat" and other arcane and mysterious words about the hiring process, but had no idea what they meant. That year, Chris was the head of the hiring committee, as he was for many years due to the respect that his colleagues had for him. I was hoping to go to him to get a few tips on how I might do well in the initial screening interviews that take place in DC seeing as he had experience conducting them for the school.

I remember asking for a few minutes of his time and thinking I would maybe get to ask a few questions. Chris, as was his way, turned this in to so much more. First, Chris actually apologized to me for not knowing that I was on the market that year, and seemed to feel it was his fault he had not known or prepared me up until now. Even though he had no official responsibility for me or my career during my time at Moritz, he felt it was his responsibility as a senior colleague to do all he could to help me. Then, instead of just answering a few questions, he spent that whole afternoon working with me to make me the best candidate I could be for the job market.

[Read more](#)

ARTICLE SUMMARY

This special edition does not include article or case summaries.

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HEADLINE NEWS

Publications and Presentations—A Sampling of Faculty Scholarship from 2015

Moritz's Dispute Resolution faculty continue to contribute meaningful scholarship

Bridge Initiative @ Mershon and Moritz

The Bridge Initiative, which combines resources from Moritz College of Law and the Mershon Center for International Securities Studies, is an indispensable resource for those doing research in issues involving dispute resolution. [[Bridge Initiative Home](#)]

Contact US

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advancing academic dialogue in alternative dispute resolution. In *Mediator Misunderstanding of Bargaining Basics: Heading in an Ugly Direction*, as published in the *Cardozo Journal of Conflict Resolution*, Professor **Josh Stulberg** suggests a mediator who privileges an interest-based bargaining approach undercuts “party self-determination and may systematically reinforce social inequalities.”^[1] Professor **Sarah Cole** discusses the need for “more frequent legal representation in arbitration” because of the increase in arbitral adjudication of statutory claims in her article titled *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* Professor Cole’s article was recently published in the *University of California Davis Law Review*.^[2]

Additional scholarship is in the queue. Professor Emeritus **Nancy Rogers** expects to publish *When Conflicts Polarize Communities: Designing Localized offices that Intervene Collaboratively* in the *Ohio State Journal on Dispute Resolution*. Professor **Ellen Deason**’s Article *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?* is forthcoming in *Dispute Resolution Magazine*. Professor **Amy Cohen** anticipates publishing *On Compromise, Negotiation, and Loss* in the *American Society for Political and Legal Philosophy*’s publication *NOMOS* and expects her 2012 article *ADR and Some Thoughts on the Social* will be reprinted in *Contemporary Legal Thought*.

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Alumni win Prestigious Dispute Resolution Awards

In June 2015 *The American Lawyer* announced winners of its [Transatlantic Legal Awards](#). **Stephen Anway** (’02) was awarded the Transatlantic Arbitration Award in part for winning a “significant arbitration victory for the Slovak Republic” defending the government’s plans for a public health insurance system. According to *The American Lawyer*’s announcement, arbitration panel determined “foreign investors are not empowered to interfere in the legislative processes of a democratic nation” and awarded the Slovak Republic more than \$1 million in legal costs. Anway is a partner with Squire Patton Boggs.^[1]

The American Bar Association Section of Dispute Resolution announced **Brian Kelso**’s (’15) essay *Drawing Outside the Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb* was judged an Honorable Mention by the 2015 James Boskey Judging Committee. The Boskey competition is designed to generate interest in dispute resolution among law students. In September Kelso’s essay will be published on [the ABA’s Dispute Resolution website](#). Kelso is the sixth Moritz alum to win or receive honorable mention in the Boskey competition. Fellow Moritz graduates include Michelle Robinson (’06), Kristen Blankley (’04), Stephen Anway (’02), Alyssa Shenk (’02) and Rene Rimelspach (’01).

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Roy Lewicki to Deliver the Annual Lawrence Lecture on September 22

Moritz is not the only College at The Ohio State University with renowned alternative dispute resolution faculty. On September 22 **Professor Roy J. Lewicki** will travel across campus from the Max M. Fisher College of Business to deliver this year’s Lawrence Lecture.

Scheduled for September 22 at noon in Room 344, Professor Lewicki’s presentation is titled *Tales of a Master Negotiator: The Challenges of Moving Theory into Practice*. Professor Lewicki will discuss his experience as a negotiator

and the practical consequences of negotiation theory. He will tell tales of his experience as a dispute resolution practitioner and scholar. [To register for this event, click here.](#)

[Read more](#)

Moritz Memorial Service for Dean Chris Fairman Scheduled for September 21 at 4:30

Christopher M. Fairman, the Associate Dean for Faculty and the C. William O'Neill Professor in Law and Judicial Administration at The Ohio State Moritz College of Law, died of cardiac arrest on Wednesday, July 22. He was 54.

The September 2015 issue of the *Mayhew-Hite Report* pays a small tribute to Dean Fairman's contribution to faculty and students at Moritz. The Ohio State law community will celebrate Dean Fairman's life at 4:30 p.m., **September 21** in **Saxbe Auditorium**. For more information or to reflect on Dean Fairman's profound legacy, please visit Moritz's [memorial page](#).

Mayhew-Hite Report The Missing Piece

Ellen E. Deason^[1]

One of the remarkable things about Chris Fairman was the striking range of subjects on which he published. He made contributions in multiple fields: Civil Procedure (most notably on heightened pleading), First Amendment (his famous work on taboo language), Dispute Resolution (collaborative law, good faith requirements), and Attorney Ethics.

His broad interests were also apparent in his personal life; one way he expressed them was through his penchant for collecting. This enthusiasm was part of what made him such an interesting friend. As we remember and celebrate Chris, I'd like to contribute a few anecdotes about this side of his personality.

Chris collected many things. Part of his devotion to sartorial excellence was apparent in his magnificent collection of silk pocket squares. In stark contrast, he also had an interest in strange anthropological artifacts. I remember his great glee as he once showed me a picture of a shrunken head he had purchased to display in his house. More conventionally, he entertained many with the collection of Supreme Court Justice bobble-head dolls that he kept in his office. We had fun discussing which were the most realistic likenesses and speculating on the meanings of the symbolic items that accompany each doll. And, ever the devoted teacher, he collected things that related to the cases he taught, which was part of his way of making the material memorable for students.

One of those teaching accessories was a small puzzle printed in 1933 promoting an initiative by the International Shoe Company to reach \$75 million in shipments that year. Civil procedure students will recognize this company as the protagonist in the famous case of *International Shoe Company v. Washington*.^[2] That case established a new approach based on the principle of due process for determining whether courts have personal jurisdiction over defendants. Chris had found the puzzle – still in its original paper envelope – in a shop in New York and didn't hesitate to buy it.

The puzzle envelope explains that "The 75 Million Dollar Club is like a great Jig-Saw Puzzle. It contains many units, which, when joined together properly, will produce the goal sought by International Shoe Company in 1933." Evidently trying to motivate sales efforts at the height of the Great Depression, the rhetoric extolls the power of the collective:

When completed, the picture of the 75 Million Dollar Club will hold all of its units together in a close bond of harmonious business and friendly association. It will represent achievement made possible by united effort and will stand forever as a monument to Courage, Faith, Co-operation, and Sincerity of Purpose.

We put the puzzle together on the top of Chris's desk one afternoon. It displays the logos of many of the brands manufactured at the time by International Shoe, including Diamond, Red Goose, Queen Quality, Sundial, and Star shoes. We laughed at some of the slogans and discussed what the puzzle reveals about the importance of the company, for the caption boasts 43 factories, 8 tanneries, and over 1000 styles of ALL LEATHER shoes. Chris snapped a photo of the completed puzzle with his phone, and every year I show it to students in an attempt to make this aspect of Civil Procedure come alive.

This year, that moment will be especially poignant because of the picture's connection to Chris. And, the puzzle carries an

additional meaning, for it is missing one piece. The analogy is obvious. Chris was a special individual and we mourn that loss. But he was also an important part of our community, which is now missing a central figure. In his role as Associate Dean, and also in his day-to-day personal interactions and teaching, Chris so effectively promoted our “united effort.” He contributed significantly to the work of the institution as a whole, especially through his attention to the success and well-being of so many of the individuals within it – students, staff, and faculty. We will remember how much he accomplished individually, but even more, how many he touched with his respect and support.

[1] Ellen Deason is a professor of law at The Ohio State University. She is the Joanne Wharton Murphy/Classes of 1965 and 1973 Professor in Law at The Ohio State University Moritz College of Law, and teaches various classes on dispute resolution, arbitration, legal systems, and civil procedure.

[2] 326 U.S. 310 (1945)

Mayhew-Hite Report Professor Fairman and ADR: Roads Yet to Explore

Joseph B. Stulberg^[1]

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He came to his scholarship in alternative dispute resolution (ADR) grounded in his strong interest in professional responsibility and lawyering. I have to believe that we could have tapped him to combine his recent passion about how words matter with those prior interests that would have led to his helping us gain a better understanding of – and sharpen our practices in – multiple ADR processes. I want to focus on one possible path.

Chris's entry into ADR scholarship targeted collaborative law. In particular, he focused on whether or how it was possible for a lawyer to discharge her professional responsibilities while framing her representation role within the obligations of the participation agreement to which all collaborative law participants, including lawyers, pledge loyalty. Here is Chris's wonderful description of the challenge:

Collaborative law's unique twist is that everyone agrees in advance that the lawyers participate solely for settlement purposes and cannot represent either party in litigation....^[2]

Collaborative law's glass ceiling is legal ethics. Unlike other forms of alternative dispute resolution, collaborative law's growth is hampered by questions of compatibility with rules of professional ethics. Critics, including some collaborative law practitioners, find it difficult to square the principles and practices of collaborative law with the professional rules of ethics concerning everything from zealous advocacy to confidentiality to terminating representation. Hence, the ideals of legal ethics collide with the ideals of collaborative law. ^[3]

Many people applaud the aspirations of collaborative lawyering. So did Chris. But his support did not blind him to the challenges it posed for role definition and professional responsibility. His proposed approach was clear and direct: lawyering in the collaborative law process differs from advocacy in other law-based settings; it needs its own ethical framework. So he proposed a model rule to give support to – and cabin – the representational role in this ADR process.^[4]

I am speculating here – but I tend to believe that the Chris Fairman I knew both respected the type of representational role embraced in the collaborative law model but also believed that it was limiting. Here is the basis of my speculation.

Chris' recent scholarship celebrates the power of words – and the right of individuals to express themselves in authentic ways, whether conventionally approved or not.^[5] To the extent that a person's doing so – whether that person be shouting them on a street corner or in a mediation session – might upset or offend listeners, I think Chris' response would be: tough

luck for the listener. Just pay attention and learn. He would, I believe, roundly belittle the growing tendency of mediation orthodoxy, at least in law school teaching settings, to have mediators insist on persons acting in polite, non-aggressive and respectful ways – akin to a judge trying to control public behavior in her courtroom by threatening contempt or removal control. Of course, who wouldn't prefer that participants behave politely, but I believe that Chris appreciated that the world outside that bubble was different – richer, more messy, but full of promise.

Here is how Chris described his own approach to advocacy:

As a former litigator, I view ADR not through a “touchy-feely” prism of conversion; I have seen no light to expose the errors of my past ways. To the extent I ever walked the ethical edge in resisting discovery, encouraging thorough (yet costly and time-consuming) pretrial motions, or promoting valiant (but ultimately unsuccessful) appellate efforts, I do not believe I ever crossed into the realm of Rule 11. Rather, I did what I thought was in the best interests of the clients who were willing and able to pay my reasonable hourly rate. [6]

Acting in this manner neither supports nor requires the vision of a lawyer discharging her responsibility of zealous advocacy “...tak[ing] every possible action to further the client’s advantage or conform to some caricature of a hyper-zealous pitbull litigator.”[7] Chris was perfectly positioned – i.e. credible – to make and support such claims.

How do these brief references to a portion of Chris’ scholarship bear on yet-to-be clarified and resolved ADR concept and practice issues? In the bargaining literature, there has been a consistent, persistent theme admonishing advocates to walk the line between hard/soft negotiating approaches[8] or to balance assertiveness with empathy.[9] The vision is that effective advocacy contributes significantly to problem-solving. It needs to be celebrated, not quashed. Recent proposals regarding participant conduct in mediation also address advocacy skills, couched in the prescription that parties to mediated conversations participate “in good faith.”[10] The meaning of that crucial phrase is famously difficult to parse out: it vacillates between the conventional belief that “we know it when we see it” to Court interpretations of the phrase in the context of interpreting statutory duties to bargain in good faith,[11] to the unpersuasive claim that the phrase is thoroughly subjective so can have no meaning.

But at least one curious question is whether those two streams in the negotiation and mediation literature are promoting comparable ideals and conduct or whether they are operating at cross-purposes.

This is only one of many avenues that Chris’ insights and expertise could have helped to clarify. If those practicing lawyers or law students trained and shaped by Chris’ person and thinking can strengthen our understanding of them, it would advance the ADR field – and be a legacy that would prompt, I’m certain, a warm smile from above.

[1] Michael E. Moritz Chair in Alternative Dispute Resolution, The Ohio State University Moritz College of Law.

[2] Christopher M. Fairman, *A Proposed Model Rule for Collaborative Law*, 21 Ohio St. J. on Disp. Resol. 73, 73 (2005)

[3] *Id.* at 74.

[4] *Id.* 117-21.

[5] See Christopher M. Fairman, *Fuck*, 28 Cardozo L. Rev 1171 (2007).

[6] Christopher M. Fairman, *Why We Still Need a Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 Ohio St. J. on Disp. Resol. 707, 709-10 (2007).

[7] *Id.* at 715.

[8] See Roger Fisher, & William L. Ury, *Getting To Yes*, 8-11 (Bruce Patton, eds., 3rd ed. 2011).

[9] Robert H. Mnookin, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, 44-56 (Scott R. Peppet & Robert

Tulumello eds., 2nd ed. 2001)

[10] See Kimberly K. Kovach, *Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic*, 38 S. Texas L. Rev. 575 (1997)

[11] For example, *NLRB v. General Electric*, 418 F. 2d 736 (1969) (interpreting whether what is now referenced as “Boulewarism” was consistent with the legal duty in the National Labor Relations Act to bargain “in good faith”).

Mayhew-Hite Report Chris Fairman

Reflections on Professor

James K. Lawrence^[1]

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Chris discerned that our disagreement – a “sharp split in ethical perspective”^[3] – lay “within the context of the larger on-going conversation on the merits of different ethical guidelines for ADR participants.”^[4] The disagreement Chris found in the two articles he reviewed should lead the way to development of separate ethical rules. Chris most kindly noted that I “stop{ped} short of advocating a separate ethical code for collaborative lawyers.”^[5] He concluded: “It is time to don a new hat.”^[6] Our collaboration permitted my early views and those of the developing CL community to jell. My reflection on our interaction serves only to underscore his love of learning, sharing, and collaborating toward improving critical thinking, the ethics of legal practice and our profession.

^[1] James K. L. Lawrence is a retired member of Frost Brown Todd, LLC and an Adjunct Professor of Law at The Ohio State University Moritz College of Law.

^[2] Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 Ohio St. J. on Disp. Resol. 505 (February, 2003).

^[3] *Id.* at 506.

^[4] *Id.* at 507.

^[5] *Id.* at 507 n.14.

^[6] *Id.* at 528.

Mayhew-Hite Report A Legacy of Value “Hats” for “New Heads”: The Scholarly Tenets Implicit in Professor Fairman’s Collaborative Law and Ethics Scholarship

Nancy H. Rogers^[1]

A set of beliefs about how scholars best contribute to improving dispute resolution permeates Professor Chris Fairman’s writings on the shortcomings of applying existing legal ethics rules to the new process of collaborative law. As with so much of what we admire and will dearly miss in Professor Fairman’s teaching, service and life at the Moritz College of Law, his pronouncement and application of this set of scholarly values serves as a legacy that can guide future dispute resolution scholars.

Scholars should endeavor to provide a simple yet precise explanation of even a complex subject. Though an expert in the complexities of both professional responsibility and collaborative law, Professor Fairman described the complicated concepts so that readers could grasp them quickly:

In collaborative law, lawyers encourage the parties to engage in joint problem solving as opposed to a traditional adversarial role. The heart of collaborative law is a written participation agreement where the parties agree not to go to court for resolution of the dispute during the collaborative process. If a party seeks judicial intervention, the agreement requires that counsel for all parties must withdraw from further representation.^[2]

He thus set the stage, first, for the reader to appreciate what setting aside adversarial instincts for a time might contribute for some disputants, especially divorcing couples. Second, lawyer readers now anticipate that there will be challenges in applying existing legal ethics rules, created for an adversarial system, to a process in which lawyers will focus on problem-solving rather than on besting the other and will resign as counsel if that approach does not result in settlement.

A dispute resolution scholar’s duty, like that of a practicing attorney, is to serve the public and particularly those with disputes. Professor Fairman had no patience for “infighting” among dispute resolution scholars about their favorite processes, explaining:

The great challenge for the ADR movement as a whole is to begin to embrace the differences that provide such a spectrum of choice for legal consumers. Only then can collaborative practitioners, as well as all lawyers, fulfill their commitment to the profession and their clients through a truly informed process.^[3]

Because he believed that scholars should serve, Professor Fairman understood *the importance of humility – such that one remains open to learning from opposing views rather than reacting defensively to criticism.* In responding to a critique of his first collaborative law and ethics article, Professor Fairman acknowledged, “[I]t remains a humbling experience to have your work dissected in this fashion.”^[4] But he added, “I thank Professor Lande for giving me this opportunity and, in the process, helping me to refine my thoughts on the intersection of collaborative law and legal ethics.”^[5]

A scholar’s point should be communicated memorably. He wrote, “While I risk becoming an ethical milliner, why should we put old ethical hats on the new heads embracing the collaborative paradigm?”^[6] Who could read that question and the reference in the article title to “Old Hats on New Heads” and not recall that Professor Fairman urged a codification of new ethical rules related to collaborative law?

These scholarly values – “value hats” we might call them – are a piece of Professor Fairman’s legacy. They fit “new” dispute resolution “heads.”

[1]* Professor Emeritus, The Ohio State University Moritz College of Law.

[2] Christopher M. Fairman, *Growing Pains: Changes in Collaborative Law and the Challenge of Legal Ethics*, 30 *Campbell L. Rev.* 237, 239 (2008).

[3] Christopher M. Fairman, *Why We Still Need A Model Rule for Collaborative Law: A Reply to Professor Lande*, 22 *Ohio St. J. on Disp. Resol.* 707, 738 (2007).

[4] *Id.* at 707 n. 4.

[5] *Id.*

[6] Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 *Ohio St. J. on Disp. Resol.* 505, 508 (2003).

Mayhew-Hite Report Teacher, Scholar

Chris Fairman – Friend,

Sarah Cole^[1]

I still cannot believe that Chris is gone. Only days before he passed, Chris and I were working collaboratively on an administrative issue related to the dispute resolution program. When I asked Chris if he had time to discuss the issue, he said, “of course.” He listened and thoughtfully responded to my concerns. He also raised new questions that I had failed to consider. As always, he was an excellent listener who carefully thought through problems until we developed a solution that worked for those involved. Whether working as an administrator or colleague, Chris had an innate capacity to identify and develop viable compromises that addressed the relevant interests.

I also admired his work as a teacher. I was so pleased when he chose to develop a seminar that explored his interest in the intersection of ethics and dispute resolution. The result, “Ethics and ADR”, was extraordinarily popular. I have learned in speaking with Chris’s students that his knowledge of the topic was unparalleled and his willingness to work with students to develop paper topics and execute their plans was legendary. More than one student from Chris’s seminar went on to win our Rogers Prize in Dispute Resolution (given to the student writing the best dispute resolution paper in the law school during a calendar year). In fact, our latest winner, Collin Flake, honed his writing skills in Chris’s seminar, penning an article on the ethics of third party funding in arbitration that was immediately snapped up for publication in the American Arbitration Association’s Dispute Resolution Journal. Chris was rightfully proud of his student’s excellent work.

Last, but most certainly not least, was Chris’s scholarship. Like everyone on the faculty, I was impressed by his work in civil procedure and freedom of speech. But, of course, I found most fascinating his work in dispute resolution generally and collaborative law specifically. Chris was actively involved in the debate and discussion surrounding the drafting of the Uniform Collaborative Law Act. His exchanges with other collaborative law scholars led the drafters of the act to reconsider their approach to a variety of questions. In other words, his work was integral to the understanding of ethics issues in this growing field. No scholar worth her salt will fail to cite Chris’s work when writing about collaborative law. In that respect, he will most certainly not be forgotten. And I have to say, as I reread Chris’s articles on ethics and dispute resolution, I admired again what an outstanding writer he was. His turns of phrase are clever and appropriate and prompt the reader to say, “More!”

Chris was a brilliant and prolific scholar, a careful and insightful thinker, a fabulous teacher, and an extraordinary citizen of Moritz. Along with my colleagues, I will miss Chris’s presence, his sense of humor and calm, and his inspirational teaching, more than I can say.

^[1] Sarah Cole is a law professor of and director of the Program on Dispute Resolution at The Ohio State University Moritz College of Law. She is the John H. Bricker professor of Law, and teaches primarily in ADR with a few classes on Torts, Remedies, and Administrative Law.

Mayhew-Hite Report Remembrance

Chris Fairman: A

Rishi Batra^[1]

Chris Fairman exemplified what it meant to be a generous mentor and colleague to junior faculty members. In the Fall of 2011 I was in the second year of my Fellowship at Moritz, and going on the hiring market for academics for the first time. I was nervous, since I had heard the words “Wardman Park” and “hot seat” and other arcane and mysterious words about the hiring process, but had no idea what they meant. That year, Chris was the head of the hiring committee, as he was for many years due to the respect that his colleagues had for him. I was hoping to go to him to get a few tips on how I might do well in the initial screening interviews that take place in DC seeing as he had experience conducting them for the school.

I remember asking for a few minutes of his time and thinking I would maybe get to ask a few questions. Chris, as was his way, turned this in to so much more. First, Chris actually apologized to me for not knowing that I was on the market that year, and seemed to feel it was his fault he had not known or prepared me up until now. Even though he had no official responsibility for me or my career during my time at Moritz, he felt it was his responsibility as a senior colleague to do all he could to help me. Then, instead of just answering a few questions, he spent that whole afternoon working with me to make me the best candidate I could be for the job market.

We started with a mock interview, with Chris playing the role of the different faculty members I would encounter at the DC interview market. He patiently gave me feedback on my answers and suggested ways I could improve. Later on, Chris went out of his way to ask me about my job talk, and when I asked him for suggestions, he took the time to go over my entire PowerPoint with me. Students that had Chris as a professor knew about his incredibly funny and effective presentations, but for me, this was the first time I was seeing the magic personally. He showed me his techniques for creating and finding interesting pictures for his slides (and his casual approach to copyright while doing so). I don't think I can ever pull off presenting exactly the way he did, but my final job talk did have a Chris Fairman signature “quote sliding out of the mouth of a Supreme Court Justice”. I like to think that Chris was proud of it (even if Justice Breyer would not have been).

I went back to Chris later that year for advice on where to publish a paper, and he was happy to talk me through the pros and cons of accepting an offer and trying for other publications. But in typical Chris fashion, he again did more than he had to. When he heard about the topic, he offered to reach out to a friend of his who knew about the area and who I could interview for more thoughts and feedback. Even though the paper was in his area – dispute resolution and ethics, for which he was well known – he offered a few humble suggestions to make the paper better, but never made me feel talked down to and conducted our conversation as if it was between colleagues rather than as a nationally known scholar talking with an admittedly inexperienced Fellow in his second year. I mentioned I would thank him in the author's note, and he quipped “Good, I need the citation.”

Of course, Chris never needed anything from me, least of all a citation. Yet he treated me like a colleague and someone that was worth helping even though it didn't help Chris at all. Many people knew Chris longer than I ever could, which is of course my loss, but even in the short time we spent together he showed me the way the best kind of colleagues and mentors can be. I know I will try to honor his legacy by trying to follow his example today and in the future.

[1] Assistant Professor of Law, Texas Tech University School of Law, Langdon Fellow in Dispute Resolution 2010-2012

Mayhew-Hite Report Publications and Presentations—A Sampling of Faculty Scholarship from 2015

Moritz's Dispute Resolution faculty continue to contribute meaningful scholarship advancing academic dialogue in alternative dispute resolution. In *Mediator Misunderstanding of Bargaining Basics: Heading in an Ugly Direction*, as published in the *Cardozo Journal of Conflict Resolution*, Professor **Josh Stulberg** suggests a mediator who privileges an interest-based bargaining approach undercuts "party self-determination and may systematically reinforce social inequalities."^[1] Professor **Sarah Cole** discusses the need for "more frequent legal representation in arbitration" because of the increase in arbitral adjudication of statutory claims in her article titled *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* Professor Cole's article was recently published in the *University of California Davis Law Review*.^[2]

Additional scholarship is in the queue. Professor Emeritus **Nancy Rogers** expects to publish *When Conflicts Polarize Communities: Designing Localized offices that Intervene Collaboratively* in the *Ohio State Journal on Dispute Resolution*. Professor **Ellen Deason**'s Article *Enforcement of Settlement Agreements in International Commercial Mediation: A New Legal Framework?* is forthcoming in *Dispute Resolution Magazine*. Professor **Amy Cohen** anticipates publishing *On Compromise, Negotiation, and Loss* in the American Society for Political and Legal Philosophy's publication *NOMOS* and expects her 2012 article *ADR and Some Thoughts on the Social* will be reprinted in *Contemporary Legal Thought*.

Faculty members regularly prepare presentations and are part of panel discussions in Columbus and across the United States. In January Professor **Ruth Colker** discussed "Special Education Complain Decisions" as part of the American Association of Law Schools Section on Dispute Resolution Panel in Washington D.C. At the ABA Section on Dispute Resolution Annual Meeting **Sarah Cole** presented "How Being Angry Leads to Good Research" and Moderated "Teaching Arbitration Law." In Columbus, **Sarah Cole** was a panelist discussing how arbitrators rule on contract interpretation issues.

^[1] Josh Stulberg, *Mediator Misunderstanding of Bargaining Basics: Heading in an Ugly Direction*, 16 *Cardozo J. Conflict Resol.* 806, 807 (2015).

^[2] Sarah R. Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?* 48 *U.C. Davis L. Rev.* 921, 921 (2015).

Mayhew-Hite Report Alumni win Prestigious Dispute Resolution Awards

In June 2015 *The American Lawyer* announced winners of its [Transatlantic Legal Awards](#). **Stephen Anway** ('02) was awarded the Transatlantic Arbitration Award in part for winning a “significant arbitration victory for the Slovak Republic” defending the government’s plans for a public health insurance system. According to *The American Lawyer*’s announcement, arbitration panel determined “foreign investors are not empowered to interfere in the legislative processes of a democratic nation” and awarded the Slovak Republic more than \$1 million in legal costs. Anway is a partner with Squire Patton Boggs.^[1]

The American Bar Association Section of Dispute Resolution announced **Brian Kelso**’s ('15) essay *Drawing Outside the Lines: Utilizing International Approaches to Resolve Due Process Concerns in Med-Arb* was judged an Honorable Mention by the 2015 James Boskey Judging Committee. The Boskey competition is designed to generate interest in dispute resolution among law students. In September Kelso’s essay will be published on [the ABA’s Dispute Resolution website](#). Kelso is the sixth Moritz alum to win or receive honorable mention in the Boskey competition. Fellow Moritz graduates include Michelle Robinson ('06), Kristen Blankley ('04), Stephen Anway ('02), Alyssa Shenk ('02) and Rene Rimelspach ('01).

In addition to winning the 2015 Nancy H. Rogers Prize in Dispute Resolution Scholarship, **Colin Flake**’s ('15) essay “Third Party Funding in Domestic Arbitration: Champarty or Social Utility?” appeared in the March 2015 edition of the American Arbitration Association’s Dispute Resolution Journal. Click [here](#) for a complete list of [Rogers Prize](#) winners.

^[1] *ALM Announces 2015 Transatlantic Legal Award Winners*, The Am Law Daily, available at <http://www.americanlawyer.com/id=1202728212768/ALM-Announces-2015-Transatlantic-Legal-Award-Winners?slreturn=20150810084905> (last visited Sept. 10, 2015).

Mayhew-Hite Report Roy Lewicki to Deliver the Annual Lawrence Lecture on September 22

Moritz is not the only College at The Ohio State University with renowned alternative dispute resolution faculty. On September 22 **Professor Roy J. Lewicki** will travel across campus from the Max M. Fisher College of Business to deliver this year's Lawrence Lecture.

Scheduled for September 22 at noon in Room 344, Professor Lewicki's presentation is titled *Tales of a Master Negotiator: The Challenges of Moving Theory into Practice*. Professor Lewicki will discuss his experience as a negotiator and the practical consequences of negotiation theory. He will tell tales of his experience as a dispute resolution practitioner and scholar. [To register for this event, click here.](#)

Professor Lewicki is a leading scholar in the study of trust development and trust repair, negotiation and conflict management processes. He is the author or editor of 36 books, including *Negotiation* (Lewicki, Saunders and Barry, 2014) and *Essentials of Negotiation*, (Lewicki, Barry and Saunders, 2015)—the leading academic textbooks on negotiation—and *Mastering Business Negotiations* (Lewicki and Hiam, 2007), a book for managers.

Companies such as Nationwide, Nestle, Limited Stores, OM Scott, Corna Kokosing, American Electronic Power, Siemens, Tosoh, The Richard M. Ross Heart Hospital and The Ohio State Medical Center have utilized Professor Lewicki's executive education services on conflict management, negotiation skills and leadership development.

For more information about the Lawrence Lecture and related events, [please click here.](#)