

MEDIATION SEMINAR—COURSE SYLLABUS
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
Fall, 2008

Thursday, 7:00pm – 9:00pm

Room _____

Faculty: Corinne M. Levitz, J.D.

Michael Nathanson, Ph.D., MBA, CPA, CEP

GOAL: To learn about the mediation process, and to understand those situations in which mediation is effective.

LEARNING OBJECTIVES:

To acquire knowledge of mediator methodology.

To acquire experience in mediation through simulated mediation exercises.

To assess the applicability of different alternative dispute resolution processes to a variety of conflicts.

To explore various contexts where mediation has been used effectively, including community, divorce/family, public sector, commercial, labor/employment, and criminal.

To learn about mediation advocacy. To learn to utilize the mediation process effectively in negotiating on behalf of clients, and serving clients' best interests pre-, during, and post-mediation.

To consider the application of mediation skills in the client counseling, negotiation, and litigation contexts.

To develop an understanding of the legal, professional, and ethical issues in the field of mediation.

COURSE REQUIREMENTS AND EVALUATION:

The following factors will be considered in **determining each student's final class grade.** (The percentage for each factor is as follows – Paper - 40%; Quiz - 30%; Participation - 20%; Attendance - 10%):

1. Class attendance is required. The instructors are to be notified of all absences, in advance. Lack of notification may result in a lower grade. Lack of attendance can affect your grade. They can be reached as follows:

Corinne Levitz: Work-312-603-1563 (can also leave messages on this line); FAX-312-603-9947; Cell-312-343-2127;
Cookie.Levitz@alumni.carleton.edu.

Michael Nathanson: Work/FAX/Home-312-664-8375;
Michael_cadcorp@sbcglobal.net.

2. Participation in classroom discussion is required. The quality of a student's participation will affect their overall grade.
3. Participation in the in-class simulations/roleplays, exercises, and presentations, if any, is required.
4. One (1) paper is required. Students will receive a letter grade on this paper. [THE PAPER IS DUE ON THURSDAY, DECEMBER 04, 2008.] [Instructions for this paper will be distributed in class. Papers may include multiple topics.]
5. Completion of one (1) quiz.

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6. Completion of all assigned readings. The required texts are:

- Bennett, Mark D. and Michele S.G. Hermann, The Art of Mediation (National Institute for Trial Advocacy, 1996)
- Fisher, Roger and William Ury, Getting to Yes: Negotiating Agreement Without Giving In (Houghton Mifflin, 2nd ed.)

There may be other additional required, suggested, or optional reading assignments. These will be announced in class.

Please note that topics and/or assignments could change during the course of the semester depending upon the progression and interests of the class. More detailed information on week-to-week assignments and changes will be provided.

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Optional additional reference materials include:

- Alfini, James J., Sharon B. Press, Jean R. Sternlight, Joseph B. Stulberg, Mediation Theory and Practice (LEXIS Publishing, 2001)
- Boulle, Laurence J., Michael T. Colatrella Jr., and Anthony P. Piccioni, Mediation: Skill and Techniques (Matthew Bender and Company – LexisNexis, 2008)
- Bush, Robert A. Baruch & Joseph P. Folger, The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition (Jossey-Bass Publishers)
- Cooley, John W., Mediation Advocacy (National Institute for Trial Advocacy)
- Goldberg, Stephen B., Eric D. Green, and Frank Sander, Dispute Resolution (Little, Brown & Co.)
- Kovach, Kimberlee, Mediation: Principles and Practice (West)

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- Moore, Christopher, The Mediation Process (Jossey-Bass Publishers)
- Rogers, Nancy H. & Craig A. McEwen, Mediation: Law, Policy & Practice (The Lawyers Co-operative Publishing Company) (or any updated edition - see: Clark/Boardman/Callaghan Publishers)
- Rogers, Nancy & Richard Salem, A Student's Guide to Mediation and the Law (Matthew Bender Publishers)
- Taylor, Alison, The Handbook of Family Dispute Resolution: Mediation Theory and Practice (Jossey-Bass Publishers, San Francisco, 2002)
- Ury, William, Getting Past No: Negotiating with Difficult People (or Getting Past No: Negotiating Your Way from Confrontation to Cooperation) (Bantam Books, New York)
- Ury, William, The Third Side: Why We Fight and How We Can Stop (Penguin, 2000)
- Van Winkle, John, Mediation—The Path Back for the Lost Lawyer (ABA Press, 2001) (ABA Product Code: 4740053)

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Listed below are:

- CLASS DATES
- TOPICS (Which may include Case Debriefings, Exercises, Guest Speakers, Roleplays/Simulations, Videotapes, and/or Student Presentations)
- ASSIGNMENTS/READINGS

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1.) Thursday, 08/28/08:

Class Overview; Mediation Overview; History of the Center for Conflict Resolution and Community Mediation; Mediation Models; Mediation Defined; Stages of the Mediation Process

2.) Thursday, 09/04/08:

Mediation Demonstration of a Simulated Community Dispute Referred from the Court.

Read: Handouts; Section 1 of The Art of Mediation

3.) Thursday, 09/11/08:

Active Listening and Other Communication Techniques (Exercises)

Read: Handouts; finish Getting to Yes

4.) Thursday, 09/18/08:

Mediation Skills and Techniques (Exercises)

Read: Handouts

5.) Thursday, 09/25/08:

“Fishbowl” Mediation Simulation I

Read: Sections 2 and 3 of The Art of Mediation

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6.) Thursday, 10/02/08:

Alternative Dispute Resolution – Overview; Conflict Resolution Styles

7.) Thursday, 10/09/08:

“Fishbowl” Mediation Simulation II

Read: The “Illinois Uniform Mediation Act” (710 ILCS35/) – <http://www.ilga.gov/legislation/ilcs>, (required)

8.) Thursday, 10/16/08:

“Fishbowl” Mediation Simulation III; Issues in Mediation: Confidentiality; Enforceability of Mediated Agreements; Impartiality/Neutrality

Read: Maiese, Michelle, Neutrality, www.beyondintractability.org/essay/neutrality, (June, 2005)

9.) Thursday, 10/23/08:

Use of Mediation in Different Contexts; Process Expertise vs. Subject-Matter Expertise of Mediators; Mediation Advocacy; (Speaker)

Read: Brand, Norm, Learning to Use the Mediation Process – A Guide for Lawyers, (September, 2000), <http://www.mediate.com/articles/nbrand4.cfm>; Common Mistakes in Mediation Advocacy, Brannigan, Colm, <http://www.mediate.ca/commonmistakes.htm>; Jones, John Paul and Yeend, Nancy Neal, Mediation Advocacy: Seven Steps for Effective Preparation, www.jpjgroup.com/artmedad.htm

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10.) Thursday, 10/30/08:

“Fishbowl” Mediation Simulation IV

11.) Thursday, 11/06/08:

“Fishbowl” Mediation Simulation V – Representing Clients
in Mediation

Read: Handouts; finish The Art of Mediation

12.) Thursday, 11/13/08:

“Fishbowl” Mediation Simulation V continued... –
Representing Clients in Mediation

Read: Handouts

13.) Thursday, 11/20/08:

In-Class Quiz

Thursday, 11/27/08 – NO CLASS

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14.) Thursday, 12/04/08:

Ethical Issues in Mediation, including: The Lawyer as Mediator, The Non-Lawyer Mediator and the Unauthorized Practice of Law, Is Mediation the Practice of Law?; Mediation as a Profession

Read: Model Standards of Conduct for Mediators, ABA/AAA/ACR, (August, 2005), <http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf>, (required);

Mediation and the Unauthorized Practice of Law, ABA Section of Dispute Resolution, (February 2002), www.mediate.com/articles/abaupl.cfm, (required);

Hoffman, David A., Ten Principles of Mediation Ethics, bostonlawcollaborative.com/documents/2005-07-mediation-ethics.pdf;

Moore, Steven W., Ethical Representation in Mediation, www.bna.com/bnabooks/ababna/annual/2006/39.pdf

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For purposes of certifying practitioners of mediation by the Association for Conflict Resolution National, the mediation process is defined as follows:

Mediation is a process of dispute resolution in which one or more impartial third parties intervenes in a conflict or dispute with the consent of the participants and assists them without coercion or the appearance of coercion. In mediation, the decision-making authority rests with the participants themselves and strongly values the parties' exercise of their self determination. Recognizing participants' needs, cultural differences, and variations in style, the mediation process allows participants to define and clarify issues, reduce obstacles to communication, explore possible solutions, and, when desired, reach a mutually satisfactory agreement. Mediation presents the opportunity to express differences and improve relationships and mutual understanding, whether or not an agreement is reached.

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OBSERVATION AND CRITIQUE OF MEDIATION

1. Arranging the Mediation
 - A. Describe what the mediator did to effectively create a problem-solving atmosphere.
 - B. What evidence was there that it was effective or ineffective?
 - C. How was the mediation setting arranged?
2. The Mediator's Opening Statement
 - A. How did the mediator describe the role of the mediator?
 - B. How did the parties demonstrate that they understood or did not understand the role of the mediator?
 - C. What did the mediator describe as the mediation process/procedures?
 - D. How did the parties demonstrate that they understood the mediation process/procedures?
3. Clarification of the Issues
 - A. What were the issues between the parties?
 - B. What did the mediator do to help the parties identify their issues?
 - C. What were the issues the parties agreed would be negotiated?
4. Identification of the Interests
 - A. Did the mediator help the parties understand the difference between their positions and their interests?
 - B. How do you know that?
 - C. What are the needs and interests of each party?
 - D. How did the mediator help the parties identify their needs and interests?
 - E. How did the mediator probe for underlying needs and interests?
5. Generation of Options
 - A. Did the mediator explore a wide range of potential options for settlement?
 - B. Who created the options for settlement?
 - C. How were these options created?
 - D. How did the mediator assist the parties in assessing whether the options satisfied/addressed the interests and needs of each party?
6. Dynamics of the Mediation
 - A. How did the mediator engage the parties in the process?
 - B. What were the sticking points or impasses during the mediation?
 - C. What techniques were used by the mediator to break these impasses?
 - D. Did these techniques work in shifting the parties off their positions?
 - E. Were there any power imbalances between the parties?
 - F. Were there any power or control issues between the parties and the mediator?
 - G. How were "control issues" manifested?
 - H. How did the mediator address these issues?
 - I. What empowered the parties the most and fostered their self-determination?

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THE MEDIATION PROCESS

1. Mediator's Opening Statement
2. Parties' Initial Statements
3. Setting the Agenda (Identifying the Issues)
4. Cross Talk I
5. Caucus with both parties
6. Cross Talk II
7. Agreement Writing/Concluding the Mediation

GENERAL APPROACHES TO COMMUNICATION IN MEDIATION

1. Neutrality
2. Translating Positions into Needs and Interests
3. Active Listening
4. Working Toward the Most Manageable Components of Issues
5. Summarization
6. Stroking

STRATEGIES FOR FACILITATING EFFECTIVE COMMUNICATION

1. Acknowledgment of Emotions
2. Effective Questioning
3. Reframing
4. Reality Testing
5. BATNA
6. Silence
7. Brainstorming
8. Flip Side
9. Neutralizing Language
10. Avoiding and Moving On
11. Intentional Deletion

DISPUTING PARTIES

Disputing parties are typically unsettled, confused, fearful, disorganized, and unsure of what to do. As a result, they feel vulnerable and out of control—i.e., they feel a lack of power.

In the heat of conflict, disputing parties typically feel threatened, attacked, and victimized by the conduct and claims of the other party. As a result, they are focused on self-protection; they are defensive, suspicious, and hostile to the other party, and almost incapable of looking beyond their own needs—i.e., they cannot recognize any worth in the other side.

HELP THE PARTIES LEARN THE BACKGROUND OF THE PROBLEM

- Ask one party to explain his/her problem.

Usually the one who contacted the mediator first is asked to begin.

In this story-development process, it may be their first opportunity to discuss their conflict in a safe setting

- Actively listen to each speaker.

Take notes, if helpful.

Use listening techniques such as restatement, summarizing, and nonverbal responses.

- Pay close attention to the behavior and body language of both parties.
- When necessary, stop the party's narration and calm both parties.
- Assure those not speaking that they will have an opportunity to speak and to be heard.
- Clarify the party's narration by summarizing, asking clarifying questions, and/ or restating.

- Maintain information flow by focusing the party's narration
- Keep the mediation flowing
- When summarizing, you may want to eliminate negative comments or descriptions.
- Check with the speaker to see if you understood the story.
- Thank the first party for providing input.
- Thank the others for being patient.
- Repeat the process with the second party.

Always watch the behavior of both for clues.

- Check with both to ensure if they are okay, need time out to calm down or to explain more.

SPECIFY THE PROBLEM

- Ask each party to assist in identifying the problem in simple, non-accusatory language.
- Probe into underlying, fundamental issues that may be at the root of the complaint.
- Define the problem by restating and summarizing the party's statements.
- Caucus as necessary.
- Summarize areas of agreement and disagreement—always start with agreement.
- Assist parties in putting issues and demands in priority order.

ADAPTED FROM THE CENTER FOR CONFLICT RESOLUTION
Chicago, IL

ELEMENTS OF THE OPENING STATEMENT

1. Introduce Yourself
2. Names Verification
 - ▶ Obtain the names of the parties and check pronunciation/spelling.
 - ▶ Ask the parties how they would like to be addressed.
3. Partiality Disclaimer
 - ▶ No prior meeting/acquaintance/relationship
 - ▶ Have the parties met the mediator? If yes, may you still continue?
4. Goal
 - ▶ Explain the goal of the meeting
5. Role
 - ▶ Explain the mediator's role.
6. Procedures
 - ▶ Explain the order of the disputants' initial statements: initiator goes first, then questions.
7. Caucus
 - ▶ Explain about the caucus.
8. Non-Primary Participants
9. Confidentiality
 - ▶ Exceptions
10. Voluntary Nature
 - ▶ Being present
 - ▶ Reaching Agreement
11. Authority to Settle
12. Ground Rules
 - ▶ Interruptions
 - ▶ Language and Decorum
12. Questions?

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ASSESSING WHETHER A CASE IS APPROPRIATE FOR MEDIATION

1. Are the parties capable of understanding the mediation process? Are they willing to abide by the rules of the process?
2. Can they speak for themselves and negotiate for themselves? Are the parties capable of negotiating in their own "best" interest?
3. Are the parties acting of their own free will, free of coercion, fear, or intimidation? Do the parties feel safe and comfortable during and after the mediation? Is there anything that would make them feel safe enough to participate? Can the mediator provide these safeguards?
4. Do the parties have sufficient information to make informed decisions?
5. Are the parties capable of reaching an agreement and carrying it out? Are the parties capable of understanding the known potential consequences of their decisions?
6. Is the mediator appropriate for this case?

SOME GENERAL WEB SITES PERTAINING TO DISPUTE RESOLUTION:

ADR News: <http://adrworld.com>

ADRonline Monthly: www.umass.edu/dispute/adronline0997.html

ADR Resources: <http://adrr.com/>

American Arbitration Association: www.adr.org

American Bar Association - Section of Dispute Resolution:
www.abanet.org/dispute/home.html

Association for Conflict Resolution: www.acresolution.org

Better Business Bureau-Dispute Resolution: www.dr.bbb.org/

The Carter Center: <http://www.cartercenter.org/>

Center for Public Resources Institute for Dispute Resolution:
www.cpradr.org

Center for the Analysis of ADR Systems: www.caadrs.org

Colorado Conflict Resolution Consortium: www.Colorado.EDU/conflict/

ConflictNet: www.igc/apc.org/conflictnet

The Conflict Resolution Education Connection: www.creducation.org

The Consensus Building Institute, Inc.: www.cbi-web.org/content/home/htm

CRInfo, the Conflict Resolution Information Source:
www.crinfo.org

www.thefacilitator.com

SOME GENERAL WEB SITES PERTAINING TO DISPUTE RESOLUTION:

Federal Interagency ADR Working Group: www.usdoj.gov/adr

Fair Division Calculator: www.math.hmc.edu/~su/fairdivision

Institute of Conflict Resolution: www.ilr.cornell.edu/depts/ICR/

Institute for the Study of Conflict Transformation:
www.hofstra.edu/academics/law/law_isct.cfm

Mediation Resource and Information Center: www.mediate.com
www.MediationNOW.com

National Academy of Arbitrators: www.naarb.org

National Coalition for Dialogue & Deliberation/The Dialogue to Action Initiative: <http://www.thataway.org/dialogue/>

National Institute on Dispute Resolution:
www.sustainable.doe.gov/database/314.html

National Association for Community Mediation: www.nafcm.org/

Network of Communities for Peacemaking and Conflict Resolution
(formerly known as the National Conference on Peacemaking and
Conflict Resolution):
www.apeace maker.net

Ohio State Journal on Dispute Resolution:
<http://www.moritzlaw.osu.edu/jdr/>

Program on Negotiation at Harvard: www.pon.org

SOME ADR LISTSERVS AND WEB DISCUSSION SITES

- DISPUTE-RES@listserv.law.cornell.edu
ADR list for educators and practitioners.
- ADR@abanet.org
American Bar Association Section on Dispute Resolution
- CyberDispute@listserv.law.cornell.edu
Online Dispute Resolution: Concerns conflicts that arise out of electronic activities.
- ADR@USDOJ.GOV
Interagency working group on alternative dispute resolution
- DIS-RES@willamette.edu
Developments in ADR; periodic updates on decisions, legislation, regulations, articles and books.
- ADRCLINIC@lwashlaw.edu
ADR - Law Clinic; professors; clinical legal education

SOME WEB SITES PRIMARILY FOR USING ADR ONLINE TO SETTLE
DISPUTES:

www.ascusc.org/jcmc/
www.clicknsettle.com
www.consensus.uk.com
www.crimfo.org
www.cybersettle.com
www.eresolution.com
www.icann.org
www.iccc.aa.psiweb.com/about_the-iccc.htm
www.interneg.org/
www.law.washington.edu/ABA-eADR
www.mediate-net.org
www.newcourtcity.com
www.novaforum.com
www.ombuds.org
www.onlineresolution.com
www.smartsettle.com
www.squaretrade.com
www.splitthedifference.com
www.themediationroom.com
www.to-agree.com
www.umass.edu/cyber/webboard.html
www.vmag.org
www.webmediate.com

Membership Organizations for Mediators

The Mediation Council of Illinois

<http://www.mediationcouncilofillinois.org/>

Association for Family and Conciliation Courts

<http://www.afccnet.org/about/index.asp>

Association for Conflict Resolution - National

<http://www.acrnet.org/>

Association for Conflict Resolution – Chicago Chapter

<http://www.acrchicago.org/index.html>

ABA Section on Dispute Resolution

<http://www.abanet.org/dispute/home.html>

Mediator Standards:

Model Standards of Conduct for Mediators (American Bar Association, American Arbitration Association, and Association for Conflict Resolution)

<http://www.adr.org/si.asp?id=2095>

Model Standards of Practice for Family and Divorce Mediation

http://www.afccnet.org/resources/resources_model_mediation.asp

MCI (The Mediation Council of Illinois) Professional Standards of Practice for Mediators

<http://www.mediationcouncilofillinois.org/standardspractice.htm>

Some Laws Relating to Mediation:

Illinois Compiled Statutes:

ALTERNATIVE DISPUTE RESOLUTION (710 ILCS 35/) Uniform Mediation Act.

<http://www.ilga.gov/legislation/ilcs/ilcs2.asp?ChapterID=51>

FAMILIES (750 ILCS 5/) Illinois Marriage and Dissolution of Marriage Act.

(750 ILCS 5/602.1) (from Ch. 40, par. 602.1); (750 ILCS 5/607.1) (from Ch. 40, par. 607.1) Sec. 607.1. Enforcement of visitation orders; visitation abuse.

Illinois Supreme Court Rules:

Effective July 1, 2006 – Child Custody Proceedings - Article IX. Child Custody Proceedings, Part A. Rules of General Application to Child Custody Proceedings, Rule 905. Mediation

<http://www.state.il.us/court/SupremeCourt/Rules/>

Rules of the Circuit Court of Cook County:

Part 13. Domestic Relations Proceedings (Amended April 8, 2002)

<http://www.cookcountycourt.org/rules/index.html>

04-27-06