

COMMUNICATION AND CONFLICT IN THE WORKPLACE

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This role-play simulation appears in the Teacher's Manual to Advanced Guide for Mediators, by Susan Nauss Exon (2014 LexisNexis). The simulation serves as a final project. Instructions and facts are handed out to the parties and their counsel who are to work together to prepare for an in-class mediation. The mediator is not given any facts other than a short verbal description regarding the type of case he or she will be mediating.

Students are instructed to engage in the convening process to prepare for mediation. In the past, I have been fairly flexible by not mandating that mediators and attorney representatives prepare certain documents. In most instances, the students are highly engaged and motivated to perform well. On a few occasions, I have noticed that mediators have not been as thorough in their preparation as I would like to see and may wait until the last minute to contact counsel and request mediation briefs, etc. I can tell how much time students engage in their mediation preparation because they are instructed to turn in, along with their final analysis papers, copies of all written communications, letters, agreements, and mediation briefs that they prepare as they get ready for mediation. In the future, I may add more structure by requesting that certain tasks be completed by a specified deadline.

When I first started using this simulation, students in the mediation class played all of the assigned roles. The last two times that I have used this or a similar simulation, I have used non-mediation students as clients and the relationship between attorney and client seemed much more realistic than when mediation students served as clients.

You can create a variation of this simulation by not providing facts to counsel and requiring them to interview clients to ascertain the facts. I have found that providing some, but not all, legal sources helps the student attorneys to focus their attention on mediation preparation rather than researching to focus on the law, a task more in line with litigation.

Here I am providing the Instructions for Professors and the template for the Final Analysis Paper Assignment, which appear in the Teacher's Manual to Advanced Guide for Mediators. If you would like to receive the factual parts for the simulation, please email Susan Nauss Exon at snexon@laverne.edu.

Instructions for Professors

This simulation can be used in a variety of methods. First, it can be used as an in-class single-stage simulation in which parts are handed out a week or two in advance. Second, it can be used over a period of several weeks as an excellent final project in a multi-stage format. The dispute involves Gene (Jean for a female) and his/her former employer, The Gas Company, including Gene's direct supervisor, Mark.

The scenario involves a sociopathic boss, Mark, who creates a frustrating work environment riddled with conflict. The situation compounds itself when a subordinate with extensive higher education, Gene, attempts to meet company goals, comply with the law,

and do the morally correct thing despite sabotaging efforts by his superior. The stage is set for a high degree of conflict due in part to power struggles; differing positions, interests, needs, values and goals; divergent communication styles; conflict tactics and strategies; and more.

The simulation is written pursuant to California law. You may wish to use the problem as written or find comparable law to use from your state. The confidential facts are set up to establish direct conflicts between the viewpoints of both parties. From a legal standpoint, there may be a problem for Gene to prove constructive discharge; under California law, plaintiff employees must prove an underlying contract or tort violation in connection with the termination. Here, Gene is an at-will employee with no written employment contract. From a factual standpoint, this simulation is excellent to illustrate varying positions, interests, power struggles, communication styles, and negotiation methodologies.

You should establish your own timetable for the simulation. If you choose to use this role-play as a single-stage simulation, provide the facts to the parties and their attorneys approximately one or two weeks in advance of the mediation so that attorneys have ample time to do some legal research and work with their clients to prepare for the mediation. If you choose to use the simulation as a final project, multi-stage simulation, I suggest that you provide enough time for attorneys to conduct some research, interview clients, help prepare clients for mediation, and engage in the convening process with the mediator. During the convening process, mediators should be instructed to request mediation briefs so that student attorneys will have to consider how much law to focus on in a brief. This can become an interesting discussion point as part of debriefing. You may want to ask students to describe how they prepared a mediation brief. Then, the discussion can focus on a comparison between trial briefs used in the adversarial process of litigation and the collaborative discussion of positions and interests inherent in mediation briefs.

Some law is provided for use by the attorneys. The reason I provide some law is because I don't want the student attorneys to spend all of their time researching and focusing on the law. By providing some law, I am giving students a foundation of relevant law. There are other reasons why I provide some legal authorities. This book is not limited to law students. For those students who are not in law school and do not know how to conduct legal research, the cited legal authorities will be invaluable. Additionally, although it is important for student attorneys to examine the law in court-connected mediations such as this scenario, it also is important for them not to lose focus of their respective factual positions. A listing of legal authorities provides a good opportunity to see how much time is devoted to positional arguing based on the law, versus arguments that concentrate on facts and underlying interests. I prefer to see student attorneys spending the bulk of their time working with their clients.

Format: As a single-stage mediation, this simulation will be handled best if it is handed out in one class with ample time for attorneys to conduct legal research, meet with clients, and engage in meaningful preparation for the mediation. In a single-stage mediation, you may choose to give the general information to the mediator.

As a multi-stage mediation, this simulation will be handled best if it is handed out well in advance of the mediation session. Do not give any factual information to the

mediator other than to tell mediators that they are to mediate an employment dispute involving allegations of constructive discharge, defamation, and related causes of action. If the mediator asks appropriate questions, she will learn that legal and factual conflicts exist. It is suggested that students have a minimum of two weeks between the date they receive their assignment and the date that the mediation occurs. Three to four weeks is preferable.

When using this assignment as a multi-stage simulation, I use mediation students as the mediator and student attorneys. While the attorneys conduct research, work with clients, and prepare mediation briefs, the mediators also have work to do. Mediators prepare a letter of introduction, an agreement to mediate, a confidentiality agreement, and otherwise control the convening process. Although students will have varied aspects of work for the simulation, they all have meaningful parts to fulfill. I suggest that non-mediation students serve as the clients during the role-play. Typically, I encourage members of our ADR Competition Team to volunteer and sometimes the mediation students persuade other students to participate as clients.

Students should conduct all of the mediation preparation outside of class. Class time or some specified three-hour block of time should be designated for the mediation session.

Regarding the mediation session, I allow students three hours or until the case settles, whichever first occurs. Since this mediation can be used as a final project, students also receive an assignment sheet, listing debriefing questions that they must write about as they prepare a maximum 12-page analysis paper after the mediation concludes. An example of the assignment sheet is included on the following pages. We videotape each mediation and post to a secure portion of YouTube so that students may view the entire mediation as they write their analysis papers. I schedule the mediations so that the analysis papers are turned in at the beginning of the final class. Then during the final class, we can debrief. Some questions for debriefing include:

1. How well did the mediator prepare for the mediation session? What type of questions did he or she ask?
2. How effective was the mediator in helping the parties brainstorm ideas for settlement?
3. Did the mediator offer any suggestions to help foster settlement? Describe.
4. Did the mediator use a facilitative or evaluative style as he or she offered suggestions? Explain.
5. How well did the mediator handle the conflict in facts and law? Did the parties reach impasse as a result or was mediator able to help the parties focus on the future and settle despite the underlying conflicts?
6. See the following pages for a sample assignment sheet, including questions that can be used for the analysis paper; focus the rest of the debriefing discussion on the questions in the assignment sheet.

Do not use the assignment sheet for a single-stage mediation unless you want students to write a self-assessment about the mediation.

Mediation Final Analysis Paper Assignment

Fall [or Spring] Semester 20__

INSTRUCTIONS

This final analysis paper assignment is in lieu of a final examination. You should, therefore, put forth your best effort because the grade for this assignment will count for 100 points of the total course grade.

Assignment

Prepare a final paper self-critiquing/analyzing a mediation in which you perform as a mediator, a disputing party, or an attorney advocate. The mediation shall last for three hours or until a final settlement is reached, whichever occurs first. Your grade for class participation that day will be based on your participation during the role-play.

The final paper should be your own work. Do not discuss the preparation of the paper with any other student, advisor, mentor, friend, family member, or faculty member.

The paper must be typed, double-spaced, a maximum of 12 pages. Use a 12-point font and standard one-inch margins. Include a separate cover page that includes the last 4 digits of your student ID number, the role that you played, the name of the assignment, and the date and time of your simulated mediation. Do not include any identifying marks on any other pages.

The final paper is due to be turned in to the professor at the beginning of the final class on (day of week), month and year. No email or fax will be permitted unless exigent circumstances exist and you receive prior approval from the professor. Only hard copies are acceptable. Any late papers will receive zero points. Note, however, that in order to complete the class, the paper must be turned in.

The final paper should not be written as a question and answer exercise. It is an assignment to challenge your ability to critically analyze a situation based on class readings and discussion. For each topic that you discuss, make sure that you define/describe relevant terms and principles and provide a factual analysis of those terms and principles to justify your conclusions.

An **outstanding paper** demonstrates a very good understanding of the defined/described terms and principles, addresses all aspects of Subparts A through and including H as outlined below, and provides a thorough factual analysis based on the mediation session.

A **basic paper** demonstrates a basic understanding of the defined/described terms and principles by being able to articulate a fundamental definition/description of terms and principles, and provide a factual analysis of the mediation session that is not as thorough as an outstanding paper. A basic paper may fail to address each specific aspect of Subparts A through and including H as outlined below.

An **inadequate paper** fails to address or articulate an understanding of the relevant terms and principles. This paper may refer to relevant terms and principles but fail to define/describe them in sufficient detail or at all. Little factual analysis of the mediation session is provided. An inadequate paper may fail to address many aspects of Subparts A through and including H as outlined below.

Papers that are well organized, well written, and grammatically correct will receive a higher grade than those that are not.

The final paper will be based on the Communication and Conflict in the Workplace simulated mediation. General information as well as confidential information for each party and respective attorney is attached. The simulation begins on (Date) when this assignment is handed out. The mediator, therefore, should take appropriate steps during the convening process to prepare adequately for the mediation, including a request for Mediation Briefs, and informal conversations via telephone or otherwise with attorney advocates. The mediator is responsible for preparing an agreement to mediate and a confidentiality agreement, and setting up the mediation room as he or she deems appropriate. Parties and counsel should work together to prepare for the mediation. A sampling of California law is being provided to attorneys and the mediator to assist in the preparation of the mediation.

Schedule of Simulated Mediations

The schedule for the simulated mediations, including party roles, is as follows:

Mediation #1: (Day of Week), Month and Year

Mediator: (Name of Student)
Gene/Jean: (Name of Student)
Gene/Jean/s Atty: (Name of Student)
Mark: (Name of Student)
Mark's Atty: (Name of Student)

Mediation #2: (Day of Week), Month and Year

Mediator: (Name of Student)
Gene/Jean: (Name of Student)
Gene/Jean/s Atty: (Name of Student)
Mark: (Name of Student)
Mark's Atty: (Name of Student)

Mediation #3: (Day of Week), Month and Year

Mediator: (Name of Student)
Gene/Jean: (Name of Student)
Gene/Jean/s Atty: (Name of Student)
Mark: (Name of Student)
Mark's Atty: (Name of Student)

Students may not attend any mediation other than the one to which they are assigned.

Plagiarism Policy

The College of Law's plagiarism policy will be strictly enforced. If a student commits plagiarism, he or she will be subject to sanctions pursuant to (Insert Appropriate Authority). For your information, (Insert Appropriate Authority) prohibits:

(Insert your plagiarism policy here)

Substantive Topics for Final Paper

You are encouraged to review the following substantive topics prior to participating in the simulated mediation. You may take notes during the mediation as long as it does not interfere with your role-play.

At the conclusion of the mediation, analyze and critique the mediation process as well as your conduct during the mediation by addressing each of the substantive topics listed below. Each analysis should reflect a thorough, well-reasoned response. Cite to specific examples where appropriate to support your analyses.

Please properly designate your response to each of the Subparts "A" through "H." Respond ONLY to the questions that relate to your specific role. Remember, you are limited to a 12-page typed paper. The total point allocation is 100 per paper. The number of points appears in parentheses so that you may gauge the importance of each Subpart.

- A. Summarize the underlying material facts involved in the dispute (4) AND:
1. Mediator: Identify each party's position(s) and interest(s). Explain. (8)
 2. Party: Did I listen to the opposing party? Do I know his/her position(s) and interest(s)? Explain. Also explain your position(s) and interest(s). (8)
 3. Attorney: Did I listen to the opposing party? Do I know his/her position(s) and interest(s)? Explain. Also explain your client's position(s) and interest(s). (8)
- B. Describe the typical Stages of Mediation. Explain. (8) ADDITIONALLY:
1. Mediator: Did I effectively use the stages of mediation discussed in class. Was I able to transition well from one stage to another? If I missed something, describe it by discussing what can and should take place during that particular stage. (7)
 2. Party: Did the mediator effectively use the stages of mediation discussed in class. Was the mediator able to transition from one stage to another? If the mediator missed something, describe it by discussing what can and should take place during that particular stage. (7)
 3. Attorney: Did the mediator effectively use the stages of mediation discussed in class. Was the mediator able to transition from one stage to another? If the mediator missed something, describe it by discussing what can and should take place during that particular stage. (7)

- C. Participants' conflict/communication style(s).
1. Mediator: What type of conflict style did the parties and attorneys exhibit? (5) Analyze and discuss how the participant conflict styles affected the mediation process and how I helped the participants communicate in such a manner as to resolve their difficulties. (7)
 2. Party: What type of conflict style did the opposing party and attorney exhibit and what type of conflict style did my attorney and I exhibit? (5) Describe how their conflict styles impacted my own style and how, if at all, the mediator helped us to communicate in such a manner as to resolve our difficulties. (7)
 3. Attorney: What type of conflict style did the opposing party and attorney exhibit and what type of conflict style did my client and I exhibit? (5) Describe how their conflict styles impacted my own style and how, if at all, the mediator helped us to communicate in such a manner as to resolve the parties' difficulties. (7)
- D. Barriers to Negotiation
1. Mediator: What psychological or cognitive barriers to negotiation did any of the participants exhibit? (4) Was I able to work through the barriers to avoid impasse? Explain. (8)
 2. Party: What psychological or cognitive barriers to negotiation did the opposing party and/or attorney exhibit? Did I exhibit any barriers? (4) Was the mediator able to work through the barriers to avoid impasse? Explain. (8)
 3. Attorney: What psychological or cognitive barriers to negotiation did the opposing party and/or attorney exhibit? Did my client exhibit any barriers? (4) Was the mediator able to work through the barriers to avoid impasse? Explain. (8)
- E. Mediator Impartiality
1. Mediator: Was I able to maintain impartiality during the mediation? Did I feel my ability to be impartial tugging at other ethical duties? (4) Cite to specific examples to support my conclusion. (6)
 2. Party: Did the mediator maintain impartiality during the mediation? Did it seem as though the mediator's ability to be impartial was tugging at other ethical duties? (4) Cite to specific examples to support my conclusion. (6)
 3. Attorney: Did the mediator maintain impartiality during the mediation? Did it seem as though the mediator's ability to be impartial was tugging at other ethical duties? (4) Cite to specific examples to support my conclusion. (6)
- F. Development of a trusting rapport among participants.
1. Mediator: What can I do to develop trust with the participants? (4) Did I develop a trusting rapport with all of the participants? Explain. (8)
 2. Party: What can a mediator do to develop trust with the participants? (4) Did I have a trusting rapport with the mediator? Explain. (8)

3. Attorney: What can a mediator do to develop trust with the participants? (4)
Did my client and I have a trusting rapport with the mediator? Explain. (8)

G. Option Generation

1. Mediator: What specific strategies and techniques did I use to help the parties generate options and help them reach a final solution? Were the parties and/or their attorneys active in option generation? How? (8)
2. Party: What specific strategies and techniques did the mediator use to help us generate options and help us reach a final solution? Was I active in option generation? How? (8)
3. Attorney: What specific strategies and techniques did the mediator use to help us generate options and help us reach a final solution? Was I active in option generation? How? (8)

H. Mediation Confidentiality. Describe the California standard for mediation confidentiality. (4) Explain why mediation confidentiality is important? (2)
Additionally:

1. Mediator: Did I handle confidentiality according to California standards? Explain. (6)
2. Party: Did the mediator handle confidentiality according to California standards? Explain. (6)
3. Attorney: Did the mediator handle confidentiality according to California standards? Explain. (6)

In addition to the above point allocation, points will be awarded for writing style (5) and for following instructions (2).