

# UNIVERSITY OF LA VERNE COLLEGE OF LAW

## MEDIATION ETHICS SEMINAR

### Spring 2014 Semester Syllabus

Associate Dean Exon

**PROFESSOR:** Susan Nauss Exon

**CREDIT HOURS:** Three Credit Hours

**DAYS & TIMES:** Mondays, 3:45 p.m. to 5:45 p.m..

**CLASS MAKEUPS:** Class is canceled on Monday, January 20 due to the Martin Luther King Holiday. A makeup day is scheduled for Wednesday, January 22 from 3:45 to 5:45.

#### I. DEAN EXON'S CONTACT INFORMATION

Office: 909-460-2043

Cell: 951-323-6280

Email: [snexon@laverne.edu](mailto:snexon@laverne.edu)

#### II. OFFICE HOURS

**Please do not disturb the professor one-half hour before any class she teaches. She is on campus most days and available to meet with students as follows:**

Mondays 12:00 – 1:00 p.m.

Tuesdays 9:00 – 2:00 p.m.

Wednesdays 9:00 – 11:00 a.m.

Thursdays By appointment

Fridays 12:00 – 2:00 p.m.

#### III. COURSE OBJECTIVES

This course emphasizes theoretical and practical applications of mediation ethics. Students will study key provisions of the Model Standards of Conduct for Mediators, the California Rules of Conduct for Mediators in Court-Connected Programs for Civil Cases, relevant California statutes, the Uniform Mediation Act, and possibly mediation standards in the state where a student intends to work after law school graduation. Through class discussion of scholarly works and dissection of hypothetical scenarios, students will learn the parameters of mediation ethics, with a particular emphasis on party self-determination, mediator impartiality, quality of process and outcome, confidentiality, conflicts of interest, and mediator competence. Students will write a comprehensive

research paper on some aspect of mediation ethics that will qualify for the upper division writing requirement.

#### **IV. TEXTBOOKS**

A. Required:

A notebook of course materials will be available for a nominal fee from the faculty secretaries or will be posted free of charge to TWEN. Additionally, many references to law review articles, journal articles, reports, and web sites will be made available to students and students will be expected to read those materials in addition to any hard copies that are provided.

B. Optional Study Aids will be made available upon request, depending on the focus of interest that a student may have regarding mediation ethics.

#### **V. TEACHING METHODOLOGY**

As an upper division seminar, the professor will provide access to scholarly works and related mediation authorities that will stimulate student dialogue. In addition to assigned readings, the professor will circulate a list of questions and/or hypotheticals to serve as a basic foundation for class discussions. Through an examination of various works, seminar students will critically examine the role of ethics in the mediation process from theoretical, legal and policy perspectives. The professor's role is to open students' minds, pose questions, but not always provide concrete answers.

During class sessions, you will be expected to participate in class discussions about theoretical topics. Although this course does not focus on case briefing, a few cases will be assigned and students will be expected to read, brief and be prepared to discuss the legal implications of the cases in a modified Socratic dialogue.

#### **VI. CLASSROOM EXPECTATIONS**

You are expected to attend every class and be prepared. That means you should read all assigned material and be prepared to discuss the concepts in class. Use the list of discussion questions and hypotheticals for each class to help you prepare for the focus of that class session. Each student will be expected to lead class discussion on at least one topic.

You are expected to be on time for each class. This is a simple courtesy to your fellow classmates and your professor. Punctuality will enable you to benefit by participating fully in the class discussions. If you are late for class, you will be marked absent. Any absence receives a zero score for class participation that day. Additionally, if you are called on in class and are not prepared, you will receive a zero for class participation that day.

This course is extremely dependent on good communication skills, both verbal and nonverbal. Therefore, laptop computers are not permitted in class. In addition, all cell phones and pagers should be turned off to avoid any distractions.

Excessive absences from class will result in an involuntary withdrawal from the course pursuant to College of Law policies.

## **VII. EVALUATION AND GRADING**

You will receive a numeric grade in accordance with the College of Law policies.

**Note: All assigned papers and homework should be typewritten. Include your name on the final research paper. With respect to the commentary papers, include a separate cover page that includes the last four digits of your Student I.D. Number and the name of the assignment. Do not include any identifying marks on any other pages.**

All written assignments must be typed in standard 12-point font with one-inch margins and should be double-spaced.

**The College of Law's plagiarism policy will be strictly enforced in this class. If a student commits plagiarism, he or she will be subject to sanctions pursuant to Part V.B of the MAPP. For your information, Part V.A of the MAPP prohibits:**

6. Plagiarism or other fraudulent representation (or material omission) relative to the originality of any part of any academic requirement in any course, including any written assignment or any examination;

Plagiarism is defined as representing, expressly or impliedly, the work of another to be one's own. Plagiarism includes, but is not limited to:

- a) using the words of another without proper attribution;
- b) paraphrasing the words of another without proper attribution; or
- c) using the ideas of another without proper attribution.

Lack of knowledge of what constitutes plagiarism shall not be a defense to a charge of plagiarism.

**Failure to adhere to any of the following 4 requirements will result in an incomplete grade for the course. The Professor reserves the right to deduct points for any assignment that is turned in late.**

The final course grade will be based on a point system, as follows:

1. Final Research Paper that conforms to the requirements of the upper division writing requirement – 65% (130 pts)

- a. The Final Paper grade includes the following components (Note: The due dates are negotiable based on class consensus):
- A one-page proposal of a topic: **Due Monday, Jan. 27 at the beginning of Class #4.**
  - A detailed outline of the paper (includes topic outlines & sources): **Due Thursday, Feb. 27 by noon**
  - A draft paper: **Due Monday, Mar. 24 or beginning of Class #11.**
  - A final paper, including a table of contents, that is worthy of a grade of 2.0 or greater: **Due Apr. 14 or beginning of last class.**
- b. Each research paper must be a minimum of 6,000 words excluding footnotes and table of contents. The paper should be double-spaced with one-inch margins. Please use footnotes rather than endnotes. All footnotes should conform to the Uniform System of Citation (19<sup>th</sup> ed.). The body of the paper should include an introduction, background research section that is well documented, an analysis/critique section, and a conclusion.
- c. All papers should be of publishable quality.
- d. Each student shall select a topic and shall receive the professor's approval prior to writing the paper. Any topic related to mediation ethics may be pursued. Some suggested topics include:
- A critique of any mediation ethical standard, such as party self-determination, mediator impartiality, etc.
  - An analysis of mediator certification
  - An analysis of whether mediation licensing is needed
  - Mediation professionalism: are ethical standards of conduct necessary?
  - A comparison of different requirements of mediation confidentiality in various jurisdictions.
  - A case note on a relatively recent mediation ethics case.
  - An analysis of how we can ensure quality mediations.
  - A critique of how court-mandated mediation is impacting the voluntary and informal nature of mediation.
  - An analysis of mediator manipulation – how does manipulation by a third-party neutral affect party self-determination?
  - An analysis of current forms of online dispute resolution (ODR) – what are ethical implications.
  - How does ODR affect mediation confidentiality?
  - An analysis of the ethical implications involved in elder mediation.
  - An analysis of the ethical implications of reporting domestic violence when learned of for the first time in mediation.
  - An analysis of the ethical implications of reporting child abuse when learned of for the first time in mediation.
  - Ethical issues in criminal mediations, i.e., victim offender restitution.
  - A critique of mediation ethics that were implicated in some mediation in which you were a participant.

2. Presentation of Final Paper to Class (all papers should be submitted to fellow students one week in advance of the presentation and may be in a final draft format) – 10% (20 pts)
3. Two written commentaries – 10% (20 pts)  
The written commentary assignments should not be written as question and answer exercises. They are assignments to challenge your ability to critically analyze a situation based on class readings and discussion. Each assignment should have an overall theme, be well organized, well written, and grammatically correct.
4. Class Participation/contribution (includes participation in theoretical and policy discussions, discussions regarding ethical hypotheticals, leading two class discussions, and questions and responses during student presentations) – 15% (30 pts)

#### **VIII. TAPING CLASSES**

You may not tape record classes unless exigent circumstances exist and you receive permission before each class.

#### **IX. DISABILITY SERVICES INFORMATION**

Students whose disabilities necessitate accommodation must comply with the notice and documentation requirements of the College of Law. Students who wish to receive an accommodation should, within the first month following initial registration, make an appointment with the Assistant Dean of Students in order to become informed of these requirements.

If you wish to receive accommodations for disability, you are responsible for reviewing The Handbook for Students with Disabilities, available from the College of Law Registrar's Office. You have certain obligations and responsibilities surrounding the accommodations and services provided by the University of La Verne and the College of Law, and must pay particular attention to the requirements for timely documentation outlined in that document.

#### **X. COURSE SCHEDULE**

The course schedule is set forth below. All assigned readings should be completed before attending the class to which they are assigned. The professor reserves the right to modify the schedule to accommodate class needs. If you are absent, you should verify the assignment for the following week. In addition, any modifications will be posted to TWEN. You are expected to check the TWEN site weekly, and are assumed to have read any posted notice.

**If the assigned article or material is not in the notebook of supplemental materials, you should download your own copy from Westlaw.**

**NOTE: Since this is a seminar course that relies on specified articles for reading assignments, the Professor may add new materials that become available during the semester to keep you up-to-date regarding course topics.**

## **MEDIATION ETHICS SEMINAR COURSE SCHEDULE**

<b><u>CLASS</u></b>	<b><u>TOPIC</u></b>
<b>1</b>	<b>Course Overview</b> <b>Overview of Mediation</b> <b>Overview of the Study of Ethics</b> <b>Sources of Mediation Ethics</b> Reading Assignment: <ul style="list-style-type: none"><li>• Skim through Uniform Acts, posted to Supplemental Course Materials forum of TWEN site</li><li>• Class #1 Supplemental Course Materials</li><li>• Kimberlee K. Kovach, <i>The Intersection (Collision) of Ethics, Law, and Dispute Resolution: Clashes, Crashes, No Stops, Yields, or Rights of Way</i>, 49 S. TEX. L. REV. 789 (2008) – Pay particular attention to Parts III &amp; IV.</li></ul>
<b>2</b>	<b>Party Self-Determination</b> Reading Assignment: <ul style="list-style-type: none"><li>• Class #2 Supplemental Course Materials</li><li>• Rules re Party Self-Determination – See Uniform Acts posted to TWEN.</li><li>• Nancy A. Welsh, <i>The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization</i>, 6 HARV. NEGOT. L. REV. 1 (2001) – Read Introduction &amp; Parts I, II, III (A) &amp; (B) on pp. 3-27 &amp; Part VI on pp. 78-93.</li><li>• John T. Blankenship, <i>The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider</i>, 9 APPAL. J.L. 165 (2010).</li><li>• Joseph P. McMahon, <i>Moving Mediation Back to its Historic Roots – Suggested Changes</i>, 37 COLO. LAW 23, 25 (2008).</li><li>• Susan D. Hartman, <i>Adult Guardianship Mediation</i>, available at <a href="http://www.tcsg.org/bpnotes/sept96/adult.htm">http://www.tcsg.org/bpnotes/sept96/adult.htm</a>.</li></ul>
<b>Jan. 20</b>	<b>No Class: Martin Luther King Holiday: Make-up on Wed., Jan. 22</b>

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<u>CLASS</u>	<u>TOPIC</u>
3	<b>Impartiality &amp; Quality of the Process</b> <b>Make-up Jan. 22, 3:45 to 5:45 in place of MLK Holiday</b> Reading Assignment: <ul style="list-style-type: none"><li>• Rules re Impartiality and Quality of the Process – See Uniform Acts posted to TWEN</li><li>• Susan Nauss Exon, <i>How Can a Mediator be Both Impartial and Fair?: Why Ethical Standards of Conduct Create Chaos for Mediators</i>, 2 J. DISP. RESOL. 387 (2006).</li><li>• Mercedeh Azeredo da Silveira, <i>Impartiality v. Substantive Neutrality: Is The Mediator Authorized to Provide Legal Advice?</i>, 62 DISP. RESOL. J. 26 (Feb.-Apr. 2007).</li></ul>
4	<b>Quality of the Process, con't</b> <b>ONE-PAGE PROPOSAL OF A TOPIC DUE</b>
5	<b>Confidentiality</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook: Specifically, review California Evidence Code Statutes regarding Confidentiality, Rule 3.854 of the California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, and Standard V of the Model Standards of Conduct for Mediators.</li><li>• Conduct your own research to find confidentiality statutes and/or rules in the state where you intend to practice upon graduation.</li><li>• <i>Cassel v. Superior Court</i>, 51 Cal.4th 113 (2011).</li><li>• <i>Rojas v. Superior Court</i>, 33 Cal. 4<sup>th</sup> 407 (2004).</li></ul>
6	<b>Conflicts of Interest</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook, including Rules re Conflicts of Interest.</li><li>• Paula Young, <i>Rejoice! Rejoice! Rejoice, Give Thanks, and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct for Mediators</i>, 5 APPALACHIAN J.L. 195 (2006) – Read all of Part C, found on pp. 209 – 220 re conflicts of interest.</li></ul>
7	<b>Mediator Competence &amp; Quality Control for the Mediation Field</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook, including Rules re Mediator Competence.</li><li>• Michael Moffitt, <i>The Four Ways to Assure Mediator Quality (and why none of them work)</i>, 24 OHIO ST. J. DISP. RESOL. 191 (2009).</li></ul>

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<u>WEEK</u>	<u>TOPIC</u>
8	<b>Mediator Manipulation</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook.</li></ul>
	<b>DETAILED OUTLINE OF PAPER DUE BY NOON, THURS., FEB. 27</b>
9	<b>ODR and Ethics</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook.</li><li>• Susan Nauss Exon, <i>The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution</i>, 12 CARDOZO J. CONFLICT RESOL. 19 (2010).</li><li>• John Helie, <i>Tips on the Use of Email</i>, located at <a href="http://www.mediate.com/articles.Emailtips.cfm">http://www.mediate.com/articles.Emailtips.cfm</a>.</li></ul>
10	<b>Informed Consent</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook.</li></ul>
11	<b>Interaction of Mediator Ethical Standards of Conduct and Attorney Rules of Professional Responsibility</b> <b>DRAFT PAPERS DUE</b> Reading Assignment: <ul style="list-style-type: none"><li>• Rules re Conflicting Ethical Guidelines – See Supplemental Notebook.</li><li>• Selected ABA Rules of Professional Conduct, including but not limited to, Rules 1.0, 1.4, 2.4 &amp; Comment 5, 3.3, 4.1 5.5, 5.7 &amp; Comment 11, 7.2, 8.3, 8.4 &amp; Comment 3</li></ul>
12	<b>Malpractice Issues</b> Reading Assignment: <ul style="list-style-type: none"><li>• Materials in Supplemental Notebook.</li><li>• Michael Moffitt, <i>Ten Ways to Get Sued: A Guide for Mediators</i>, 8 HARV. NEGOT. L. REV. 81 (2003).</li></ul>
13	<b>Student Presentations</b>
14	<b>Student Presentations</b> <b>FINAL PAPER DUE</b>