

St. John's University School of Law
Course Number 12846: Mediation: Representing Clients
Professor Elayne E. Greenberg
Syllabus Fall 2015*

Tuesdays 10 am – 1:00 pm.*

Course Description:

In this interactive course, students will be educated about the theory and skills attorneys need to advance your clients' interests in mediation. This course will be taught in three segments: negotiating, mediating and advocating in mediation. In the Segment One, students will review the fundamentals of negotiation, focusing on how lawyers can create value and overcome negotiation impasses. In Segment Two, students will shift their focus to that of a mediator's and be educated about the theory, ethics, skills and practice of how mediators mediate. Finally in Segment Three, students will combine the skills learned in the previous segments and return their perspective to that of an attorney who is advocating for their client in mediation. In this segment, students will be educated about the essential skills for effective client representation in mediation. Students will examine the attorney's responsibilities in all phases of mediation. Students will be exploring practice choices about how to advise clients about dispute resolution options, prepare both the case and the client for mediation, represent clients in the actual mediation session(s) itself, and draft ADR clauses. Students will prepare mediation representation plans and briefing papers. The course will culminate in the students participating in a mock mediation with professional mediators. Students enrolled in the course will be required to read, write, analyze, discuss and perform. The course will have graded written assignments during the term and a take-home examination, which will be handed out on the last day of class.

Course Assignments (required):

TEXTS:

Golann, *Sharing A Mediator's Power: Effective Advocacy in Settlement*

Mnookin, Peppet & Tulumello, *Beyond Winning – Negotiating to Create Value in Deals and Disputes* Belknap Press of Harvard University Press (2000)(paperback 2004).

Ethics:

Model Standards of Conduct for Mediators (2005)

Self-Inventory:

Kraybill Conflict Inventory Style: Style Matters

Read people's emotions at

http://well.blogs.nytimes.com/2013/10/03/well-quiz-the-mind-behind-the-eyes/?emc=eta1&_r=0

Law:

The Uniform Mediation Act at

http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf

Skim concerns about the Uniform Mediation Act at

<https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26854>

The Facebook, Inc. v. Pacific Northwest Software, Inc., --- F.3d ----, 2011 WL 1346951 (9th Cir. 4/11/11)

In re. A.T. Reynolds & Sons, Inc., d/b/a Leisure Time Spring Water, Debtor 2011 WL 1044566 (S.D.N.Y).

Articles:

Bush, "What Do We Need a Mediator For?": Mediation's Value-Added for Negotiators," 12 Ohio S. J. on Disp. Resol. 1 (1996)

Goldfein & Robbennolt, "What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles," 22 Ohio State J. on Dispute Resolution 2 (2007).

Greenberg, "Starting Here, Starting Now: Using the Lawyer As Impasse-Breaker During the Pre-Meditation Phase." in Definitive Creative Impasse-Breaking Techniques in Mediation (2011)

Greenberg, "The Globalization of Law: part One and Two," (2011).

Love, "Top Ten Reasons Why Mediators Should Not Evaluate," at <http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/244/love.pdf>

Riskin, "The Contemplative Lawyer on the Potential Contributions of Mindfulness to Law Students, Lawyers and their Clients" 7 HVNLR 1 (Spring 2002). Also at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1436&context=facultypub>

Riskin "Replacing the Mediators Orientation Grid Again: The new, new Grid System, Vol.23 No.8 Alternatives (Alternatives 2005) at <http://geoffsharp.atomicrobot.co.nz/wp-content/uploads/2010/03/newgrid-riskin.pdf>

Spiro, Edward M and Mogul, Judith L., "Mediation Confidentiality: Meaningful but Not Absolute," *New York Law J.* 12/18/12 at http://www.maglaw.com/publications/articles/00320/_res/id=Attachments/index=0/Mediation%20Confidentiality%20Meaningful%20but%20Not%20Absolute.pdf

Weil, Richard S, "Is Mediation Confidential in New York?" *New York Law J.* 10/25/12 at <http://weilmediation.com/PDF/NYLJConfidentiality.pdf>

Drafting ADR Clauses:

Jams, *Drafting ADR Clauses* at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>

CPR, *Drafting ADR Clauses* at <http://www.cpradr.org/RulesCaseServices/CPRModelClauses.aspx>

Podcasts:

To be assigned

Suggested Readings:

Arrow, Mnookin, Ross, Tversky and Wilson, *Barriers to Conflict Resolution* (1995)

Bush, Folger, *The Promise of Mediation: The Transformative Approach to Conflict* (2005)

Fisher and Shapiro, *Beyond Reason: Using Emotions As you Negotiate* (2005)

Frenkel and Stark, " Changing Minds: The Work of Mediators and Empirical Studies of Persuasion, 28 Ohio St. J. on Disp. Resol. 263 (2013).
<file:///Users/Elayne/Downloads/SSRN-id1769167.pdf>

Kolb, Williams and Frohlinger, *Her Place at the Table: A Woman's Guide to Negotiating Five Key Challenges to Leadership Success* (2004).

MacFarlane, Julie, "THE EVOLUTION OF THE NEW LAWYER: HOW LAWYERS ARE RESHAPING THE PRACTICE OF LAW," J. Disp. Resol. Symposium p 61 (2008)

Sternlight, Jean R., " *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*," 14 Ohio State J. on Dispute Resolution, 269 (1999).

Sternlight & Robbennolt, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation and Decision Making* (ABA Publications 2013

Stone, Patton, Heen and Fisher, *Difficult Conversation: How to Discuss What Matters Most* (1999)

Ury, *Getting Past No* (1991)

Fisher and Ury, *Getting to Yes* (1981).

Golann and Folberg, *Mediation: The Roles of Advocate and Neutral second edition* (2011).

Grading

- Representation Plan (20%)
- Briefing Paper (30%)
- Final Debrief Take Home (20%)
- Quality of Class Participation and Demonstration of Representation Skills (25%)

- Quiz (5%)

ATTENDANCE IS REQUIRED AT ALL CLASSES.

WRITTEN SUBMISSIONS AND TAKE HOME FINAL ARE REQUIRED TO BE SUBMITTED BY REQUIRED DEADLINE.

SEGMENT ONE: NEGOTIATION FUNDAMENTALS

CLASS 1- September 1, 2015

How do lawyers create value in negotiations by managing the five negotiation tensions? (Understanding the concepts)

Assignment due for today's class:

- ✓ Read Mnookin et al. *Beyond Winning* in its entirety. Read with care sample dialogues.
- ✓ Complete Kraybill Conflict inventory available on course Twen course site.

Topics to be discussed:

- Welcome and Course Mechanics
- A global perspective of negotiation theory
- Understanding the five tensions in negotiations
- Strategies that inhibit or enhance value

Exercises:

- Extrapolating lessons from dialogue
- Story telling perspectives
- Improvisation Exercise

CLASS 2- SEPTEMBER 8, 2015

How do lawyers create value in negotiations by managing the five negotiation tensions? (Practicing the concepts)

Assignment due for today's class:

- ✓ Re-read "*Beyond Winning*" Part II, III and Chapter 11.

Topics to be discussed:

- Quiz on “*Beyond Winning.*”
- Understanding way lawyers might create value in their deal-making and distributive roles
- Preparing for the negotiation – preparing you, your client, your colleague - Pre-Negotiation worksheet
- Implementing negotiation strategies
- Overcoming negotiation challenges
- Conducting ethical negotiations

Exercise:

- Simulation – pre-negotiation, negotiation, debrief

SEGMENT TWO: MEDIATION

CLASS 3- SEPTEMBER 15, 2015

What is mediation, and how do mediator's add value? (Part One)

Assignments due for today's class:

- ✓ Bush, “What Do We Need a Mediator For?": Mediation's Value-Added for Negotiators,” 12 Ohio S. J. on Disp. Resol. 1 (1996)
- ✓ Model Standards of Conduct for Mediators (2005)
- ✓ Riskin “Replacing the Mediators Orientation Grid Again: The new, new Grid System, Vol.23 No.8 Alternatives (Alternatives 2005) at <http://geoffsharp.atomicrobot.co.nz/wp-content/uploads/2010/03/newgrid-riskin.pdf>
- ✓ Love, “Top Ten Reasons Why Mediators Should Not Evaluate,” at <http://law-wss-01.law.fsu.edu/journals/lawreview/downloads/244/love.pdf>
- ✓ Read people's emotions at http://well.blogs.nytimes.com/2013/10/03/well-quiz-the-mind-behind-the-eyes/?emc=eta1&_r=0

Topics to be discussed:

- Anatomy of a Mediation – introductory meeting, in-person meeting (structure, caucus) and post mediation
- Value of Mediation
- Mediator Qualifications

- Mediator Ethics
- Overview of different styles and types of mediation.
- Mediators' Active Listening Skills
- Caucus – Pros and Cons

Exercises:

- Mediation DVDS
- Verbal and non-verbal communication skills
- Simulation with mediator and two unrepresented parties

CLASS 4- SEPTEMBER 22, 2015

How do mediator's mediate? (Part Two)

Assignments due for today's class:

- ✓ Riskin, *"The Contemplative Lawyer on the Potential Contributions of Mindfulness to Law Students, Lawyers and their Clients"* 7 HVNLR 1 (Spring 2002). Also at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1436&context=facultypub>
- ✓ Review Model Standards of Conduct for Mediators
- ✓ Greenberg, *"Starting Here, Starting Now: Using the Lawyer As Impasse-Breaker During the Pre-Meditation Phase."* in *Definitive Creative Impasse-Breaking Techniques in Mediation* (2011).
- ✓ Prepare posted ethical problems

Topics to be discussed:

- How to develop a mediator's mind?
- What are some ethical issues for mediators in general and for mediator/lawyers specifically?
- From a mediator's perspective, how do mediators work with parties represented by attorneys?
- How do mediators manage negotiation tensions to enhance value of the mediation outcome?

Exercises:

- Mindfulness exercise
- Ethical Problems
- Simulation with Represented Parties

CLASS 5 – SEPTEMBER 29, 2015

Is mediation a confidential process?

Assignments due for today's class:

- ✓ The Uniform Mediation Act at http://www.uniformlaws.org/shared/docs/mediation/mediat_am00.pdf
- ✓ *Skim* concerns about the Uniform Mediation Act at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26854>
- ✓ The Facebook, Inc. v. Pacific Northwest Software, Inc., --- F.3d ----, 2011 WL 1346951 (9th Cir. 4/11/11)
- ✓ In re. A.T. Reynolds & Sons, Inc., d/b/a Leisure Time Spring Water, Debtor 2011 WL 1044566 (S.D.N.Y).
- ✓ Weil, Richard S, “*Is Mediation Confidential in New York?*” *New York Law J.* 10/25/12 at <http://weilmediation.com/PDF/NYLJConfidentiality.pdf>
- ✓ Spiro, Edward M and Mogul, Judith L., “*Mediation Confidentiality: Meaningful but Not Absolute,*” *New York Law J.* 12/18/12 at <http://www.maglaw.com/publications/articles/00320/res/id=Attachments/index=0/Mediation%20Confidentiality%20Meaningful%20But%20Not%20Absolute.pdf>

Topics to be discussed:

- Sources of mediation confidentiality
- Limits of mediation confidentiality
- How to align mediator’s and parties’ confidentiality expectations

Exercises:

- Negotiate an Agreement to Mediate
- Simulation

SEGMENT THREE: ADVOCACY IN MEDIATION

CLASS 6 – OCTOBER 6, 2015

How does an attorney share a mediator’s power? (Overview and Pre-mediation)

Assignment for today’s class:

- ✓ Read in its entirety Golann, “Sharing A Mediator’s Powers”

Topics to be discussed:

- Identify opportunities for attorneys to work with the mediator to create value.

- Overview of the purpose of pre-mediation: Develop an understanding of client's interests and how to make pre-mediation choices that advance the client's interests.
- Prepare generic questions you would include in a client interview to assess if the case is suitable for mediation. Develop client-interviewing skills to help assess the suitability of mediation.
- Counsel your client about mediation.
- Approach opposing counsel about using mediation.
- Factors considered when you chose a mediator.
- Consider what information is needed to develop an effective representation plan.
- Initial communications with the mediator

Exercise:

- Interview and counsel client;
- Work with other side to suggest mediation,
- Review mediator resumes. Select and interview Mediator.
- DVD Clip - Initial contact with mediator.

CLASS 7 – OCTOBER 13, 2015

How does the attorney advocate in the pre-mediation phase of mediation? What are the specific advocacy considerations in pre-mediation contacts, written communications, and briefing papers?

Assignment for today's class:

- ✓ Goldfein & Robbennolt, *"What if the Lawyers Have Their Way? An Empirical Assessment of Conflict Strategies and Attitudes Toward Mediation Styles,"* 22 Ohio State J. on Dispute Resolution 2 (2007)
- ✓ Read assigned simulation, private facts and representation template in pre-mediation packet
- ✓ What additional information do you need in your representation plan? Prepare questions to develop a representation plan.
- ✓ What is your theory of the mediation? Include identification of impasses, settlement analysis

Topics to be discussed:

- Mediating the tension between attorney's zealous representation and mediation advocacy
- The anchoring and fluidity of a representation plan
- The briefing paper as an opportunity to create value
- Considerations in preparing an effective opening statement - allocation of attorney/client roles

- Synchronizing your representation plan, briefing paper and opening statement

Exercise:

- Critiquing segments of briefing papers for effectiveness
- Theory of the mediation - telling your story
- DVD clips

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THE IN-PERSON MEDIATION

CLASS 8- OCTOBER 20, 2015

What are the advocacy choices that effective mediators make when beginning the in-person mediation meeting?

Assignment for today's class:

- ✓ Complete representation plan and submit for grade
- ✓ Prepare opening statement -
- ✓ Prepare Statement of Facts for Briefing Paper and submit (no more than two pages) -

Topics to be discussed:

- Analyzing opening statements Distinguishing lawyer advocacy opportunities when the attorney is a requesting or responding party
- Advocacy considerations in analyzing the allocation of the attorney and client roles.
- Mediating past the opening statement

Exercises:

- Each attorney/client team will prepare, deliver and critique their opening statements using the assigned hypotheticals. Class will critique different styles and assess effectiveness
- Mediating after the opening statement
- DVD Clips

CLASS 9 - OCTOBER 27, 2015

What are the advocacy choices attorneys make in mediation when they share information and negotiate offers?

Assignment for today's class:

- ✓ Read and prepare assigned simulation – representation plan and opening statement.
- ✓ Listen to assigned Ted Talk on Empathy

Topics to be discussed:

- Practice challenges in preparing
- Intermittent debriefs of mediation
- Review of ways to share the mediator's powers
- Pros and cons of caucus
- Addressing Numbers and Concession Patterns
- The power of empathy

Exercise:

- Mediate simulation
- Develop skill of self-evaluation of effectiveness.

CLASS 10 – NOVEMBER 3, 2015

How do attorneys effectively translate active court cases into collaborative mediation meetings?

Assignment for today's class:

- ✓ Read and prepare assigned simulation – representation plan
- ✓ What influence, if any, do the accompanying court document have in how you have prepared yourself and your client for mediation?

Discuss:

- Skills collaborative advocate use to help overcome different types of impasses
- Identify advocacy responses to mediator's interventions

Exercise:

- Skype guest mediator
- Mediation simulation
- Debrief

CLASS 11 – NOVEMBER 10, 2015

What are the risks and benefits of drafting multi-step dispute resolution clauses?

Assignment for today's class:

✓ CPR, *Drafting ADR Clauses* at
<http://www.cpradr.org/RulesCaseServices/CPRModelClauses.aspx>

✓ Jams, *Drafting ADR Clauses* at
<http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>

CLASS 12 -NOVEMBER 17, 2015

How do attorneys effectively advocate in a global world and respond appropriately to cultural differences in mediation?

Assignment for today's class:

- ✓ Read, Greenberg, "The Globalization of the Practice of Law, Part One and Two."
- ✓ Prepare assigned simulation
- ✓ Putting it all together – Getting ready for the final

Discussion:

- Culture as a value enhancer or detractor

Exercise:

Mediating Culture

HANDOUT FINAL MEDIATION FACT PATTERN

CLASS 13- FINAL ON NOVEMBER 20 OR DECEMBER 1, 2015

Mock Mediation

Participate in mock mediations before professional mediator and receive individual feedback on the skills displayed.

SUBMIT REPRESENTATION PLAN AND BRIEFING PAPER.
RECEIVE REMAINDER OF FINAL EXAM.

*Syllabus subject to modification. Pre-class mini-talks will be uploaded to the class Twen site throughout the semester.

Ongoing work in progress