

*January 29, 2015*

**HARVARD LAW SCHOOL**

**MEDIATION – Spring 2015**

David A. Hoffman, Lecturer on Law

Teaching Assistant: Cory Liu

Clinical Instructor: Prill Ellis

Faculty Assistant: Caryn May

**SYLLABUS**

**Readings for the Course**

- Handouts (from Distribution Center)
- Optional: David A. Hoffman, *MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS* (2013) (“HOFFMAN”)
- Other optional readings will be posted on MyHLS

**Week 1 (1/29): Mediation – Basic Principles**

- Introductions and an overview of the course
- Basic principles/characteristics of mediation
- Mediation video

**Reading Assignment:**

- GOLDBERG & SANDER, pages 107-41
- Albie Davis, *The Logic Behind the Magic of Mediation*
- BEER & PACKARD, pages 3-11 and 29-35
- Optional reading: HOFFMAN, CH. 1

No written submission is due for this week, but please come to class prepared to discuss the following questions. The readings for this week describe some core principles of mediation. To what extent does mediator Sy Weinstein observe, or fail to observe, those principles in the mediation described in the readings? Please give examples. If Albie Davis had observed this mediation, what do you think she would say about Weinstein’s handling of this mediation?

**Week 2 (2/5) – Ethics**

- Principles of mediation ethics
- Discussion of ethical dilemmas

**Reading Assignment:**

- GOLDBERG & SANDER, pages 703 -19
- David Hoffman, *Ten Principles of Mediation Ethics*
- Optional reading: GOLDBERG & SANDER, pages 183-94

Written submission [Due by 9 p.m. 2/4]: Please write a description of an ethical dilemma, in which a mediator’s duties are in conflict, and then describe (a) what duties are in conflict, and (b) how you would resolve the dilemma (no more than one page).

### **Week 3 (2/12) – Styles of Mediation**

- The role of caucusing
- Facilitative, evaluative, directive, and transformative styles of mediation
- Does the mediator need subject-matter expertise?

#### Reading Assignment:

- GOLDBERG & SANDER, pages 479-509
- Leonard Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*
- Lela Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*
- Marjorie Aaron, *Do's and Don't's for Mediation Practice*
- Robert Baruch Bush and Joseph Folger, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 84-95 (1994).
- Optional reading: HOFFMAN, ch. 4
- Optional reading: GARY FRIEDMAN AND JACK HIMMELSTEIN, CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING (excerpt)
- Optional reading: Jennifer G. Brown and Ian Ayres, *Economic Rationales for Mediation* (excerpt)

Written submission [Due by 9 p.m. 2/11]: In Week One we read an account of a mediation by Seymour Weinstein, and this week's reading includes a description of a mediation by John Haynes. How would you describe the ways in which Haynes' style differs from, or is similar to, Weinstein's? If you were asked to provide them with feedback on their work, what would you say? (No more than a page.)

### **Week 4 (2/19) – The Psychology of Mediation**

- The role of emotion in mediation
- Cognitive barriers to settlement
- Personality disorders and other mental health problems

#### Reading Assignment:

- ROGER FISHER AND DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (chapter 2)
- HOFFMAN, ch. 7
- Optional reading: WILLIAM EDDY, HIGH CONFLICT PEOPLE IN LEGAL DISPUTES (excerpt)
- Optional reading: Hoffman, *Mediation, Multiple Minds, and Managing the Negotiation Within*

Written submission [Due by 9 p.m. 2/18]: Please draft (no more than one page) the facts in a hypothetical mediation case involving one or more challenging psychological issue(s) and describe how you would envision handling such a case as the mediator.

### **Week 5 (2/26) – Diversity Issues in Mediation**

- What forms of diversity affect the mediation process?
- Conscious vs. unconscious bias
- Learning to navigate differing cultures

Reading Assignment:

- GOLDBERG & SANDER, pages 566; 571-84
- Michelle Hermann et al., *An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation*
- Carol Liebman, *Mediation as Parallel Seminars: Lessons from the Student Takeover of Columbia University's Hamilton Hall*
- Optional reading: HOFFMAN, ch. 8
- Optional reading: Jeswald Salacuse, *Ten Ways That Culture Affects Negotiating Style: Some Survey Results*
- Optional reading: Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*
- Optional reading: Robert Terry, *The Parable of the Ups and Downs*
- Optional reading: David Hoffman, *Why Do We Care About Diversity*

Written submission [Due by 9 p.m. 2/25]: Please draft (no more than one page) the facts in a hypothetical mediation case involving one or more challenging diversity issue(s) and describe how you would envision handling such a case – either as counsel for one of the parties or as the mediator.

**Week 6 (3/5) – Role of Counsel in Mediation**

- Principles of mediation advocacy
- The rules of legal ethics for counsel in mediation
- Cooperation, competition, and problem-solving
- Collaborative Law

Reading Assignment:

- GOLDBERG & SANDER, pages 76-80, 373-75
- Charles Craver, *Negotiation Ethics: How to be Deceptive Without Being Dishonest; How to Be Assertive Without Being Offensive*
- James White, *Machiavelli and the Bar*
- Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*
- Optional reading: HOFFMAN, ch. 9
- Optional reading: Thomas Arnold, *Twenty Common Errors in Mediation Advocacy*
- Optional reading: GOLDBERG & SANDER, pages 183-97; 355-71
- Optional reading: Eric Galton, *Representing Clients in Mediation*

Written submission [Due by 9 p.m. 3/4]: Please read the facts in the Erie Elevator role play, which will be posted on MyHLS, and write an opening statement for the mediation of the case (no more than a page). If your last name begins with the letters “A” through “K,” please write an opening as counsel for Erie Elevator, and do not read the two pages of confidential facts for Owning Corp. If your last name begins with the letters “L” through “Z,” please write an opening as counsel for Owning Corp. and do not read the two pages of confidential facts for Erie Elevator. If you are willing to deliver your opening statement in class, please notify Cory Liu. If we do not have sufficient volunteers in advance, I will ask for volunteers in class. When delivering an opening statement, it is

important not to read it, and so please be familiar enough with the basic points in your opening to deliver it with only occasional reference to your text or notes.

### **Week 7 (3/12) – Confidentiality and Privilege**

- Confidentiality and privilege: statutes, rules, and contractual protection
- The Uniform Mediation Act and other statutes
- Recent case law

#### Reading Assignment:

- GOLDBERG & SANDER, pages 441-59, 663-91
- Massachusetts Confidentiality Statute (Mass. Gen. Laws ch. 233, § 23C)
- Cases: *Wilson v. Wilson* (Georgia); *Cassell v. Superior Court* (California); *Leary v. Geoghan* (Massachusetts); *Hand v. Walnut Valley Sailing Club* (Kansas)
- Optional reading: BEER & PACKARD, page 98, 143-49
- Optional reading: GOLDBERG & SANDER, pages 460-72
- Optional reading: HOFFMAN, ch. 6

Written submission [Due by 9 p.m. 3/11]: Which mediation statute is better and why – the Uniform Mediation Act or the current Massachusetts statute? Does the case law that we are reading for this week of the course shed any light on this question (no more than one page)?

**[Spring Vacation – no class on March 19]**

### **Week 8 (3/26) – Legal Issues in Mediation**

- Enforceability of agreements to mediate
- Enforceability of mediated settlement agreements
- Mediator liability
- Is “good faith” required in mediation and, if so, what is it?
- Mediation hybrids – case evaluation and med-arb

#### Reading Assignment:

- GOLDBERG & SANDER, pages 307-09
- Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*
- Michael Moffitt, *Suing Mediators*
- Michael Young, *Mediation Gone Wild: How Three Minutes Put an ADR Party Behind Bars*
- Cases: *Guthrie v. Guthrie* (Georgia); *In re Marriage of Ames* (Texas); *Silkey v. Investors* (Indiana); *Ali Haghghi* (Minnesota)
- Optional reading: BEER & PACKARD, pages 161-74
- Optional reading: James Coben and Peter Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*
- Optional reading: William Leahy and Karen Rubin, *Does Good Faith Avoid a Breach of Mediation Confidentiality*

- Optional reading: Kathleen Scanlon and Adam Spiewak, *Enforcement of Contract Clauses Providing for Mediation*

Written submission [Due by 9 p.m. 3/25]: Draft a judicial opinion, no more than one page, in the role of a single justice of the Court of Appeals, ruling on (a) whether to uphold the orders issued in *Doe v. Francis* and why, and (b) whether to sanction or reprimand the trial judge in that case and why.

### **Week 9 (4/2) - Critiques of Mediation**

- Mandatory participation and pressure to settle
- Privatization of the justice system
- Disadvantages in mediation for the disadvantaged
- Assessing the results: settlement versus court
- Class exercise: role play in case involving power imbalance

Reading Assignment:

- GOLDBERG & SANDER, pages 147-52, 390-94, 402-08
- Jonathan Hyman, *Swimming in the Deep End: Dealing with Justice in Mediation*
- Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*
- Trina Grillo, *The Mediation Alternative: Process Dangers for Women*
- Optional reading: BEER & STIEF, pages 77-79

Written submission [Due by 9 p.m. 4/1]: What do you consider to be the strongest critique of mediation and what is the strongest counter-argument (no more than one page)?

### **Week 10 (4/9) – Credentialing and Regulation**

- Distinguishing the forms of credentialing: licensure, certification, accreditation, and others
- Assessing the performance of mediators
- Regulating the performance of mediators
- Class exercise: assessing mediators' performance using video recordings

Reading Assignment:

- GOLDBERG & SANDER, pages 153-82
- Christopher Honeyman, *On Evaluating Mediators*
- Craig McEwen, *Giving Meaning to Mediator Professionalism*
- ACR Model Standards for Mediation Certification Programs (2010)
- Optional reading: GOLDBERG & SANDER, pages 693-701
- Optional reading: ACR Task Force on Mediator Certification (2004)

Written submission [Due by 9 p.m. 4/8]: If you were designing a program for the certification of mediators, what would the components be and why? What components, if any, would you *not* use, and why (no more than one page)?

## Week 11 (April 13-15) – Role Plays

- **No class on April 16**
- Role play instructions to be posted on MyHLS – each student will be assigned to one of the following groups depending on students' availability:
- April 13
  - Group A – 9:00 a.m. – 12 noon
  - Group B – 12:30 – 3:30 p.m.
  - Group C – 4:00 – 7:00 p.m.
- April 14
  - Group D – 9:00 a.m. – 12 noon
  - Group E – 12:30 – 3:30 p.m.
  - Group F – 4:00 – 7:00 p.m.
- April 15
  - Group G – 9:00 a.m. – 12 noon
  - Group H – 12:30 – 3:30 p.m.
  - Group I – 4:00 – 7:00 p.m.

Written submission [Due by 9 p.m. on April 20]: Please write no more than **three** pages on (a) what you did well as a mediator in the mediation simulation; (b) what you would do differently as a mediator next time; and (c) what you learned from either your own work or another person's work as mediator or counsel in the role play.

## Week 12 (4/23) – Deeper Dimensions of Mediation

- The personal qualities of the mediator
- Spiritual aspects of mediation
- The role of ritual, apology, and forgiveness

### Reading Assignment:

- Kenneth Cloke, *Conflict as a Spiritual Path* (in KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION*)
- Daniel Bowling and David Hoffman, *Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation* (excerpt)
- Kenneth Cloke, *No More Teachers' Dirty Looks – A Case Study* (from KENNETH CLOKE, *THE CROSSROADS OF CONFLICT: A JOURNEY INTO THE HEART OF DISPUTE RESOLUTION*)
- Optional reading: *The Spiritual Revitalization of the Legal Profession: A Search for Sacred Rivers* (excerpts), by Prof. David Hall
- Optional reading: David Hoffman and Richard Wolman, *Mediation as a Spiritual Practice*

Written submission [Due by 9 p.m. 4/22]: Imagine you are designing a course on mediation that you are going to teach – please explain (a) whether you would include in the course syllabus materials of the kind assigned for reading this week, or not, and (b) why (no more than one page).

## **Readings for the Course and Class Attendance**

It is very important for the success of this course that everyone stay current with the readings for each class. We learn from each other, and therefore I consider it part of our responsibility to each other to make class discussions as useful and interactive as possible. The optional readings are posted on MyHLS, and not in the reading packets. They are intended to enrich your understanding of the topics covered each week, in case you might wish to explore a topic further – possibly in connection with your research paper. Also, since part of your grade in the course will be based on the work we do together in class, I expect that everyone will (a) make an effort to participate and (b) attend each class unless there are exigent circumstances of some kind. If you cannot attend a class, please let me know beforehand by email.

## **Written Work**

The written work requirements for the course are of two kinds:

- **Research paper.** There is no exam for this course. Instead, each student is expected to submit a research paper, which is due no later than 5 p.m. on the last day of exam period (May 7). The topic and a prospectus for the paper must be approved in advance. When you submit your paper topic, please describe it in no more than a paragraph. Your prospectus should be one or two pages, and should describe the literature or other sources you plan to consult for the paper and a summary of what you intend to discuss. The length of the paper should be between 5,000 and 6,500 words (including footnotes in that count). This works out to approximately 15-20 pages double-spaced. Conciseness and clarity of expression will be considered a plus. You may attach to your paper any exhibits, documents, or other items that would be useful for me to have when I am reading the paper, and those pages will not count toward the word count. Citations should be according to Blue Book style.
- **Weekly written submissions.** As described in this syllabus, you will be expected to submit to the MyHLS Dropbox each week a one-page double-spaced reading response (see the syllabus above for details on the requirements for each week). I may use this material (without attribution) as a basis for a portion of the class discussion. These submissions must be submitted *no later than 9 p.m.* on the Wednesday before each class – earlier is fine. Any submissions that we receive after 9 p.m. will not be used, nor will they be included in consideration of your written work. Exception: the submission for Week 11 is three pages and is due on April 20.

## **Role Play**

Each student will participate in a three-hour role play during Week 11. In this three-hour session, you will have an opportunity to act as a mediator and also participate as one of the parties and as one of the attorneys. The logistical arrangements for the role plays will be discussed in class.

## **Grades**

One half of your grade will be based on your research paper; the other half will be based on the other work that you do in the class, including class discussion, the weekly written submissions, and your work in the mediation role play during Week 11. Because there will be only 11 meetings of this class, an unexcused absence from class will affect your grade.

### **Research Paper Schedule**

Topics to be submitted by 4 p.m. on Thursday of Week 6 (3/5) – submit to Dropbox

Responses from me by one week later

Prospectus to be submitted by 4 p.m. on Thursday of Week 9 (4/2) – submit to Dropbox

Responses from me by one week later

Papers are due no later than 5 p.m. on the last day of exam period (May 7) – submit to Dropbox

### **Contact information**

Contact info for Caryn May (Hauser 418): (617) 495-9200; [cimay@law.harvard.edu](mailto:cimay@law.harvard.edu).

Contact info for Cory Liu: (512) 366-2714; [cliu@jd15.law.harvard.edu](mailto:cliu@jd15.law.harvard.edu)

Contact info for me:

- By email: [DHoffman@BostonLawCollaborative.com](mailto:DHoffman@BostonLawCollaborative.com) (this works better than my harvard.edu email address)
- By phone at Boston Law Collaborative, LLC: (617) 439-4700 x201 (voice mail is available 24/7)

My preferred mode of communication is email, but if there is something that you would prefer to discuss in person or on the phone, please let me know. Please mark emails as “time-sensitive” if you need a response in less than 48 hours.

### **Office hours in Areeda 135**

By appointment only, on Thursday, 2:30 - 4:00 or other times by arrangement

I am happy to meet with students as needed, and I particularly welcome the chance to talk with students about their research papers. I will be available for office hours on an as-needed basis; just let me know when you would like to meet. Conferring by phone or email is OK too, if that is more convenient. To arrange a time to meet during office hours or talk with me at another time, please contact Karen Richards (617-439-4700 x205), who will be keeping the calendar of office hours. I will ordinarily be on campus only for class and the times when appointments have been made.

### **Laptops**

Except in special circumstances, such as accommodating a disability, the use of laptop computers is not permitted in class, except during the mid-class break.