

Prof. C. Menkel-Meadow  
Negotiation and Mediation  
Monday and Wednesday 9:45 am-11:45 am  
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Office Hours: Monday 2:30-4:00 pm and as scheduled

LAW 592  
Fall 2014  
Room 4700 and 4850 Law  
4 credits

## **NEGOTIATION AND MEDIATION**

### **Course Description**

This course is designed to teach you the theory and practice of negotiation and mediation (as facilitated negotiation) by exposing you to both conceptual and behavioral forms of learning. Every lawyer negotiates, whether in dispute resolution (litigation) or transactional and planning contexts. Many do so without understanding why they do what they do or how they actually behave during a negotiation. In this course we hope to give you some theoretical models and frameworks to guide your conceptualization of the negotiation process in particular contexts, as well as to help you understand how your own behavior may or may not be congruent with the analytical choices you think you have made. Most importantly, we hope to teach you how to be aware of your own negotiation processes, both in terms of how you conceptualize a negotiation “problem” and how you behave when negotiating. In addition, we hope to help you see how lawyer-client interactions structure the negotiation choices you have. Our goals in this course include teaching you how to continue to evaluate your own negotiating work so that when you leave this course you will always be reflective and evaluative about what you are doing.

You will be required to read, write, discuss and perform. Unlike many law school courses, this one will require you to apply what you have read immediately, by asking you to think about and plan an approach to solving a negotiation problem and then to act on your plans. Because negotiation is an interactive process, you will frequently have to adjust your analysis and behavior, based on what other parties (and your own client) may do. Thus, this course will teach you to act, as well as, think, like a lawyer. We will also teach you how to give feedback to each other and to yourself. Being criticized for one’s behavior as well as for one’s thinking is often quite threatening, but if done well, it is the best way to learn and this may be one of the last opportunities for you to get “free” feedback on how you are perceived by others. In short, whether or not you actually practice law, this course should help you live your life, no matter what you do.

Many people act from assumptions about what is at stake in a negotiation, what the other side wants or is like and what they think they can do to “win.” We will learn to look at and question those assumptions. If this course is successful it will teach you to think about every negotiation as an opportunity to solve a problem that exists or create new value where there was none or try to make a bad situation a bit better (making lemonade out of lemons, as a wise person once said to me!). We hope to enhance your ability to think creatively and synthetically as well as analytically. You will also learn that planning is essential and can sometimes make up for your novice status as a new legal negotiator. And, you will learn that “people” skills may be just as important as technical skills. The skills

you will learn include analysis, persuasion, creativity, listening, interviewing, counseling, question-framing, and the use of law and legal principle. We will also explore the moral and ethical issues implicated in negotiation--honesty, integrity, character, reputation and personal identity.

We will also introduce you to the process of facilitated negotiation: mediation. When negotiators are unsuccessful in negotiating their own agreements directly they may turn to third parties for help, with analysis, communication or solution-crafting. Increasingly in American courts you will be asked to participate in mediation or other forms of assisted dispute resolution before going to trial. So, these processes are used both in private (and transactional) settings as well as in public ones. Mediation and negotiation processes are also being used for policy formation, conflict resolution in a wide variety of complex disputes (environmental, international), as well as in family disputes and conventional and large class action lawsuits. We will explore some of the difficult policy and ethical issues in uses of these processes in different settings.

In short, we want you to develop the “micro” skills necessary to be effective negotiators at the same time that you develop a “macro” consciousness about the uses to which your skills will be put.

This is a lot to do in a relatively short time, so we require your commitment and welcome your comments, reactions and suggestions.

### **Course Objectives:**

1. Understand conceptual and analytic models of negotiation, drawn from behavioral sciences, game theory, decision sciences and legal studies.
2. Understand how to analyze aspects of a negotiation problem to know which models are appropriate in which contexts.
3. Learn how to plan for a legal negotiation, considering needs, interests, objectives of one’s own client and the needs, interests and objectives of other parties to the negotiation or others affected by the negotiation.
4. Learn how to “create value” and “solve problems” in both dispute and transactional negotiation settings.
5. Consider what the “role of law” is in negotiated legal problem solving.
6. Learn to understand and plan for the strategic behaviors of different models of negotiation to effectively implement appropriate behaviors for particular kinds of negotiation.

7. Learn to appreciate and plan around common “barriers” to negotiated agreements in human cognition and behavioral errors or misperceptions.

8. Learn to communicate effectively with others (clients, principals, other negotiators, colleagues).

9. Consider the ethics of negotiation and make “ethically effective and appropriate” choices.

10. Consider and appreciate the role of culture, values, personality, race, class, gender and other “differences” in negotiation choices.

11. Understand the differences in dyadic (2 person) negotiations and multi-party negotiation and dispute resolution processes.

12. Consider negotiation processes as “foundational” models and skill sets for other dispute resolution processes, like mediation, consensus building, etc.

13. Develop your own capacity to reflect on, learn from and critique your own performances and experience for future learning.

14. Consider the policy issues in the use of negotiation and related dispute resolution processes for resolving disputes and planning transactions.

### Course Requirements

#### 1. Attendance

Because you will be playing roles as clients and lawyers and the learning of the whole class depends on it, **attendance is mandatory for all sessions. Absence, for any reason, must be approved by the instructor. If you miss more than two classes your grade will be lowered.**

#### 2. Readings

The required course books are Menkel-Meadow, Schneider and Love, *Negotiation: Processes for Problem Solving*, 2<sup>nd</sup> ed. Aspen Wolters Kluwer, 2014) and Fisher, Ury & Patton (3<sup>rd</sup> Ed. 2011 Penguin), *Getting to YES*. Also recommended are Douglas Stone, Bruce Patton & Sheila Heen, *Difficult Conversations: How to Discuss What Matters Most* (Penguin Press, 1999); Carrie Menkel-Meadow and Michael Wheeler, *What's Fair: Ethics for Negotiators* (Jossey-Bass, 2004); Robert Mnookin, Scott Peppet and Andrew S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Harvard-Belknap Press, 2000); Howard Raiffa, *The Art and Science of Negotiation* (Harvard Univ. Press); and Kenneth Arrow, Robert Mnookin, Lee Ross, Amos Tversky and Robert Wilson, (eds), *Barriers to Conflict Resolution* (W.W. Norton, 1995). There are also many

popular books on negotiation that might be of some interest to you. Occasionally throughout the semester other materials will be assigned, whether in photocopied form or posted on TWEN (our password for the TWEN page is *Agree*).

The literature on negotiation and mediation is now vast. I will be happy to make bibliographic suggestions as you request them, either during work on particular negotiation problems or as you complete your paper assignments. There are also several important journals you might want to become familiar with including *Negotiation Journal*, *Conflict Resolution Quarterly*, *Ohio State J of Disp. Res.*, the *Journal of Dispute Resolution* (Missouri-Columbia), *Alternatives to the High Cost of Litigation* (CPR Institute for Dispute Resolution) and the *Harvard Negotiation Law Review*. All of these should be available in the library or on line.

### 3. Written Assignments

There will be short written assignments at least once a week, including guided reflections pieces, legal memos, negotiation plans, negotiation agreements, analyses and self-critiques of negotiation exercises, etc. All assignments are due on the date specified--no extensions will be permitted without instructor approval and you will be penalized for any late papers.

### 4. Final Paper

You should submit a final paper (about 10-15 pages in length) that will be due at the end of the examination period. This paper can be on any topic of your choice and my approval. You may choose to analyze a negotiation, mediation or dispute resolution problem that you have participated in or observed, an international, domestic or legal problem that you would like to analyze from a dispute resolution perspective or you may write a critique of some existing literature or do a small research project in the area of dispute resolution, negotiation or mediation. You should discuss all writing projects with me. There is no final examination in this course.

### 5. Grading

The grade for this course will be based on the quality of your written work and your participation in the negotiation exercises. Grades will not be based on competitive grounds of the "results" of outcomes of your negotiations. Your grade will be based on your ability to think creatively and to come up with good and wise solutions to the legal and other problems you are being asked to solve. We want to encourage you to take risks and experiment with your own thinking and behavior and we don't want grading to inhibit that activity. Your preparation, commitment, insight and improvement during the duration of the course will count in your final grade. You will receive comments and some indication of progress on your assignments. Note that you will have many interim "grades" on the multiple assignments in this course. There are likely to be as many as ten separate "graded" exercises so no one exercise or grade should inhibit you from trying new behaviors. Class

contribution (“quality” of comments and preparation, not simple “participation”) will count toward your grade.

### 6. Confidentiality

Many of the problems depend on confidential instructions. Much of the time you will work with a partner and often you will work in larger groups working on the same side of a case or transaction. It is important that you not share instructions about a problem until you are told you can do so by the instructors (following the de-briefing of an exercise). Your honesty, integrity and ethical conduct here will not only count in your grade but in how you are seen by your peers, as well as by your instructors. If you have any questions about the confidentiality of any facts, ask the instructor.

### Course Schedule

| <b>Date</b>   | <b>Topic and Reading Assignment</b>  | <b>Exercise</b>             |
|---|--|-----------------------------|
| <b>Unit I: Introduction and Models of Negotiation</b> |  |                             |
| M Aug. 18   | Introduction and Overview<br>Negotiation and Conflict Theory<br>Text pp. 3-31 (Ch. 1)<br>Intro, <i>Getting To Yes</i> (xxvii-xxix)   | <i>Swanson</i>              |
| W Aug 20  | Models of Negotiation: Learning Agendas<br>First Principles of Dyadic Negotiation with clients<br>Role of clients/advocates<br>Skills: Interviewing and Counseling<br>Text pp. 41-77 (Ch. 2) | <i>Walker</i>               |
| M Aug 25  | Evaluating Negotiations: Process and Outcomes<br><br>Text pp. 79-103 (Ch. 3 parts)   | <i>Walker</i><br>due        |
| W Aug 27  | Introduction to Models of Negotiation #1<br>Traditional/Adversarial<br>Text pp. 161-183 (ch.5)<br>GTY Ch. 1 pp.3- 15   | <i>Bedding/Swealy</i>       |
| M Sept 1  | Labor Day – no class (How do labor and management<br>Conduct negotiations?)  |                             |
| W Sept. 3   | Models of Negotiation-#2 Principled Negotiation<br>Role of Law<br>Text pp. 117-124 (Ch. 4) and<br>Ch. 12, pp.431-446; (Ch. 3 and 5 of GTY)   | <i>Klare</i><br>distributed |

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|----------------------------|---|---|
| M Sept. 8                  | Models of Negotiation #3 Problem Solving<br>Text pp. 125-160 (Ch. 4)<br>Finish <i>Getting to YES</i>      |   |
| W Sept. 10                 | Models of Negotiation # 4 Mixed Models<br>Text pp. 183-202 (Ch. 5)  | <i>Klare due</i>                                    |
| M Sept 15 and<br>W Sept 17 | Simulations in class [and possible email<br>Negotiation with other schools]                               | <i>The Gallery</i><br><i>Getting A Better Price</i> |
| M Sept 22                  | Debrief simulations—Lessons learned so far?<br>-What has gone well; what should have gone<br>differently? |   |
| W Sept. 24                 | Stages and Phases of Negotiation<br>Text pp. 31-39  | <i>Bright/ Gold</i>                                 |

## Unit II: Negotiation in Dispute Settings

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|-------------------------|--|--------------------------|
| M Sept 29               | Planning for Negotiation<br>Interviewing- Fact Gathering-Analysis;<br>Planning Solutions-Counseling & Creativity<br>Text [review chapters 2 and 3] |                          |
| W Oct 1                 | <i>Negotiation Problem Distributed- meeting with Client</i>  |                          |
| M Oct 6 and W Oct 8     | Mid-semester Review week; prepare Negotiation  |                          |
| M Oct 13-Friday Oct. 17 | <i>Schedule Litigation Negotiation</i><br><i>Planning Document, Negotiation and Self-Critique</i>  |                          |
|                         | <i>Due: Simulation # 2 Planning Document, Agreement and Self-Assessment</i>  |                          |
| M Oct. 20               | Review and De-brief Negotiation Simulation   |                          |
| W Oct. 22               | Barriers to Negotiated Agreements<br>Text pp. 315-351 (Ch. 9)  | <i>Class Exercises</i>   |
| M Oct. 27               | The Psychology and Social Dimensions of Negotiation<br>Text. Pp. 275-314 (Ch. 8)   | <i>MODE</i>              |
| W Oct. 29               | The Ethics of Negotiation<br>Text pp. 393-430 (Ch. 11)   | <i>Valdez v. Alloway</i> |

