

LAWYER AS PEACEMAKER:

DELIVERING UNBUNDLED, COLLABORATIVE, AND PREVENTIVE LEGAL SERVICES TO EXPAND LEGAL ACCESS

J TERM, WINTER 2015

Forrest S. Mosten, Instructor

COURSE LEARNING OBJECTIVES AND REQUIREMENTS

Learning Objectives:

- Learn the basic concepts, values and perspectives of peacemaking, limited scope representation values, collaborative law, and preventive legal services; survey developments in the legal profession and field of conflict resolution.
- Learn and practice lawyering skills involved in these basic concepts
- Explore alternative role models and possible career opportunities in peacemaking

Course Requirements:

- Completion of required readings
- Attendance. Attendance at all class sessions is mandatory. Please arrive on time. Students are expected to return to class on time after breaks.
- Constructive participation in class discussion and exercises. Proactive participation is a cornerstone of this course.

Instructor's Office Hours and Communication

Instructor will be in his office the hour immediately preceding all class sessions.

If you wish to communicate with the Instructor, the Instructor's email is mosten@mostenmediation.com and cell phone is 310-721-4291

Assessment

50% - Student's preparation for class (completion and knowledge of readings and quality of written assignments) and active and thoughtful participation in class discussion and in role play simulations

50% - Final Exam (take home due by the conclusion of exam period) Based on the concepts and lessons learned in class, each student will write a letter to a client (5-7 pages) based on a client fact situation.

Class Format

There are 5 class sessions in this course with the modules described below. Each module will consist of an opening lecture on the topic, class discussion, , and a class exercise. It is anticipated that a module scheduled for one class will continue into the following class session.

CLASS SCHEDULE

ALL CLASSES SHALL BE HELD IN ROOM 2477 -2:00-4:40 PM

Tuesday, January 6, 2015

Lawyer as Peacemaker

This module introduces the central concepts and themes for this course. The focus will be on ethical issues regarding peacemaking and You will explore establishing your Lawyering Signature (core values, attributes, type and style of services offered to the public) and designing your legal career as a Peacemaker and Manager of Dispute Resolution.

Write a Law Practice Mission Statement Incorporating Peacemaking Values and Services

Readings:

- Mosten, F. S: *The Lawyer as Peacemaker (Abridged)*, ABA Family Law Quarterly, Fall 2009
- Do You Have What It Takes To Be a Mediator?" in Mosten, F. S. *Mediation Career Guide: A Strategic Approach to Building a Successful Practice*. Jossey-Bass, 2001
- "The Mediator's Presence and Personal Qualities of the Mediator" in Bowling, D and Hoffman, D., *Bringing Peace Into The Room*
- "Peace, Authenticity, Role of the Practitioner of Peace, Listening, Caring and Humility, excerpts from Nan Waller Burnett
- Mosten, F. S. *Beyond Mediation Toward Peacemaking*, ACR Magazine, Fall 2013

Class Assignment: In groups of 4, discuss the following:

Assuming that the four students will be law partners to commence a practice together on the Monday following being sworn in as a member of the bar, apply your respective life core values and personal attributes to type of work setting, areas of law, population served, income

anticipated for your law practice that will feature peacemaking services. As a group, answer the following questions:

1. What are our common personal and professional values for our firm known for peacemaking?
2. What are our best, common, and complementary personal attributes that will make our firm a success as peacemakers?
3. Where in Los Angeles County will our firm be located and why? What demographics of clients will we seek to serve?
4. What will the office setting be like? What type of building? How will the office be designed?
5. What areas of law will we practice? Will we specialize?
6. What type of peacemaking services will we offer as a firm and individually.

Written Assignment Due Thursday, January 8

Write Out Answers To the Following Questions Which Are Due By The Start of Class, Thursday, January 8. You will be provided a separate document in WORD upon which to write your answers

PEACEMAKING AND LAWYER AS MANAGER OF DISPUTE RESOLUTION

1. What professional and personal values do you bring into your professional relationship with Judith?
2. How do your values impact the way you conduct your initial meeting with Judith and decisions that she needs to make
3. If Judith hired you to file a lawsuit and represent her in court, what would you do as her lawyer?
4. What role would you play in working on her legal problem?
5. What decisions would need to be made and how would they be made?
6. How long would it take to have a result in court?
7. How will litigation impact the current conflict in the family and in Judith's life?
8. What would be the financial costs to Judith to have you be her litigator?
9. What is the emotional toll on Judith to get a court result?
10. What would be the impact of litigation on the relationship between Judith and Calvin and with the rest of her family?

11. If you filed a lawsuit on Judith's behalf, what opportunities would there be to negotiate a settlement?
12. What role would you play in this negotiation?
13. What different formats would there be in which to negotiate a settlement.
14. When would be the first opportunity to negotiate?
15. Would you attempt to negotiate before filing a law suit?
16. Would you make threats? What threats would there be?
17. Would you attempt to persuade Calvin and Jacqueline that they are at fault and to blame for the problems and that they are the cause for Judith considering to file a law suit?
18. Would the role of apology have any place in your discussions? In your presentation, who would apologize to whom? How would you choreograph an apology?
19. What impact would an acceptance of apology have?
20. How would forgiveness come into play?
21. What role would you play as Manager of Dispute Resolution for Judith?
22. What other options to resolve her problem would you discuss with Judith?
23. How would you compare and contrast litigation with other options?
24. What criteria would you use to compare and contrast litigation with other options and the other options with each other?
25. What strategies would you use to make sure that Judith has informed consent before authorizing you to file a law suit?
26. How would you build in a reevaluation of strategy that you wish to employ?

Thursday, January 8, 2015

The lawyer's duty to provide informed consent of various dispute resolution processes.

Readings:

"The Lawyer as Dispute Resolution Manager" in Mosten, F.S. and Scully, E.. *Complete Guide to Mediation* (ABA 2015 Publication Forthcoming)

ADR Pledge of the Beverly Hills Bar Association

- Class Exercise: Conduct a client consultation to explore and compare consensual and non-adversarial options to litigation ;

Written Assignment Due Friday, January 9

Write Out Answers To the Following Questions Which Are Due By The Start of Class, Friday, January 9. You will be provided a separate document in WORD upon which to write your answers

UNBUNDLED LEGAL SERVICES

1. How do you assess whether Judith is a Self-Represented Litigant (SLR) when you first come into contact with her?
2. Do you offer limited legal services? If so, what are the reasons? If not, what are the reasons?
3. Do you offer both full services and limited services? If so, how does Judith know what you offer before she calls you?
4. How do Judith's demographics fit in with the prototype SLR?
5. What would be Judith's motivations for self-representing?
6. Does Judith have the ability and skills to successfully be a SLR?
7. What resources are there for Judith to get legal information and help to be a SLR?
8. If you were just to meet with Judith once, what value could you offer Judith in deciding whether to be a SLR?
9. If Judith chooses to be SLR, what emotional and social challenges will she face?
10. What initial confidence do you believe Judith would have that she could successfully self-represent?

- 11. What initial fears do you believe Judith would have that she could successfully self-represent and not get overwhelmed?**
- 12. Assuming that Judith has the following typical concerns of self-represented litigants, how would you address them?**
 - a) She believes that despite paying you, you could do very little more than she can to resolve her matter;**
 - b) She is concerned that you will not stand up for her with Calvin and his family**
 - c) She believes that you may push the case to court and not try to settle**
 - d) She doubts that you will really listen to her and hear her needs and concerns**
 - e) She does not believe that you will be clear and relevant in your explanations of options and her rights**
 - f) She wonders whether you have the competence to handle her matter**

- 13. Are you the appropriate lawyer to offer Judith limited scope services?**
- 14. Is unbundling appropriate for Judith?**
- 15. What benefits and risks regarding unbundling would you wish to address with Judith in your next client conference?**
- 16. What additional facts do you believe Judith needs to resolve her problem?**
- 17. How would you and Judith divide the work to gather and present those facts?**
- 18. How would you charge for your services? Why would your services be cost effective for Judith**
- 19. Assuming that Judith wants your help in drafting a letter to Calvin, how would you and Judith divide the work?**
- 20. What steps would you take to draft the letter?**
- 21. Assume that after receiving the letter, Judith indicates that she wants to go to mediation.**

- 22. What issues would you discuss with Judith about whether or not to accept Calvin's invitation to go to mediation?**
- 23. What limited role would you play in setting up the mediation, preparing for the mediation, attending the mediation, and reviewing any agreements?**

Assume that the mediation does not settle the case. Calvin has hired an attorney and filed a Petition to void the will and have the assets divided pursuant to her parents' alleged oral promise. The hearing on the Petition is in 3 weeks.

- 24. What limited role you could play in obtaining facts from Calvin?**
- 25. What limited role you could play in preparing documents and witnesses for the hearing if Judith represents herself in court?**
- 26. What limited role you could play attending the upcoming court hearing and what tasks you would do and what tasks Judith would do.**

Friday, January 8, 2015

Lawyer as Unbundled Service Provider

The focus of this module will be on the concept of Unbundled Legal Services to meet the needs of self-represented litigants. We will discuss coaching clients and being a shadow lawyer to improve client's knowledge of the law and ability to meet their objectives. We will also review the skills of negotiation, letter/court document drafting, and representation in mediation advocacy as they apply to limited scope representation of clients.

Class Exercise: Interview Client Discussing Limited Scope Representation as an Informed Consent Option to Full Service Representation

Readings:

- Macfarlane, J., *Identifying and Meeting the Needs of Self-Represented Litigants* (May 2013, Canada)
- Greacen, John, *Self-Represented Litigants and Court and Legal Responses to Their Needs: What We Know* (Skim)
- Talia, Sue Limited Scope Representation in Herrera, *Reinventing the Practice of Law* (ABA 2014)
- ABA White Paper on Limited Scope Representation –Introduction (2014)
- ABA Resolution in Support of Limited Scope Representation (2013)
- Mosten, Mindset Quiz: Are You Ready to Unbundle? (Mosten, Unbundling Legal Services (ABA, 2000))

Class Exercise: Draft a limited scope lawyer-client engagement agreement and prepare an otherwise self-represented client for the lawyer to serve as ghostwriter for letters and court documents as well as a negotiation coach

Written Assignment Due Tuesday, January 13

Write Out Answers To the Following Questions Which Are Due By The Start of Class, Tuesday, January 13. You will be provided a separate document in WORD upon which to write your answers

COLLABORATIVE LAW (CL)

1. How does CL differ from traditional negotiation in the “Shadow of the Law?”
2. How does early intervention differ from the litigation model?
3. How does CL differ from mediation?
4. How can CL work in conjunction with mediation?
5. How does CL differ from Cooperative Law?
6. What are the key values of CL?
7. How would you show respect and dignity for Calvin and his family and still help Judith?
8. Given their current conflict, how could Judith show respect and communicate directly with Calvin?
9. What would healing look like for this family?
10. How does interest based negotiation differ from the way Judith and Calvin are handling their dispute at the present time?
11. What role and responsibilities would Judith have in the CL process?
12. How can you competently represent Judith if you are not permitted to threaten or file any court action to gain her leverage?
13. Why could CL be a viable option for Judith?
14. What are the risks for Judith in selecting CL?
15. What are different models of CL available to Judith?
16. What are the key elements of the Attorney-Client Engagement Agreement and the Four Way Participation Agreement? Why do you need both documents signed?
17. How does CL offer an interdisciplinary approach?
18. Describe the steps of the CL process?
19. How would you engage and convene Calvin to start CL?
20. What role would you play in the CL process (Representative, Advocate, Ally, Consultant, Coach Educator, Manager, Counselor at Law)?
21. How would you handle resistance by Calvin or his attorney to CL or if they want a different CL model?
22. What would be your agenda for the first joint session?
23. What other professionals might be necessary to make the process work?
24. How would you work collaboratively with other CL professionals?
25. How would you estimate fees for Judith in CL? How would fees compare with mediation or traditional representation?

Tuesday, January 13, 2015

Collaborative Lawyering

This module will explore the basic concepts of Collaborative Law, the Lawyer Disqualification Clause contained in a Collaborative Participation Agreement, Interdisciplinary Law Practice, and the use of Interest-Based Negotiation

Readings:

- “Collaborative Law: *What It Is and How It Works*” and “*Structuring the Interdisciplinary Practice Model*” in Mosten, F.S. *Collaborative Divorce Handbook*, Jossey- Bass, 2009
- . *Collaborative Law: Principles and Guidelines*
- Uniform Collaborative Law Act (Selected Sections)

Class Exercise: In a meeting with lawyers and clients, negotiate the terms of a Collaborative Law Agreement that disqualifies the negotiating lawyers from later representing their clients in litigation;

Written Assignment Due Thursday, January 15

Write Out Answers To the Following Questions Which Are Due By The Start of Class, Thursday, January 15. You will be provided a separate document in WORD upon which to write your answers

Lawyer as Preventive Legal Health Care Provider

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1. How does your professional relationship with Judith permit a preventive approach?
2. Assuming you work out a settlement for Judith, how do you determine when is the next time you will be in contact with Judith? Who will initiate this contact
3. How do you describe your preventive role to Judith?
4. How are fees and preventive planning initiated by you handled?
5. How do you differentiate your role as an advisor and that of a provider of needed preventive services?
6. How do you probe for legal soft spots and latent need?
7. How is a focus on legal rights and duties different from a preventive approach?

- 8. How does an unspoken and unresolved lawyering approach differ from a preventive approach?**
- 9. How is a preventive approach different from resolving a past event for Judith?**
- 10. How is a preventive approach different from resolving a current crisis for Judith?**
- 11. What is symptomatic preventive planning for Judith?**
- 12. What is asymptomatic preventive planning for Judith?**
- 13. How can a systematic and broad approach be employed for Judith?**
- 14. How can the design of your office impact a preventive approach?**
- 15. How can you be a client educator for a proactive approach for Judith?**
- 16. What educational resources and curriculum can you provide for Judith?**

- 17. What type of adult learning methods can you use to empower Judith and teach her to be an effective client?**

- 18. What elements of a Dispute Resolution Clause would you recommend for Judith to handle future disputes?**

- 19. What opportunities exist for preventive mediation in Judith's situation?**

- 20. How will any agreement reached between Calvin and Judith be monitored for compliance and success? Can you activate a calendar to alert and track preventive steps?**

- 21. How would you employ life cycle planning to prevent future legal angina in this family?**

- 22. How would you use a Preventive Legal Check-up to help Judith assess her Legal Wellness?**

- 23. When do you close Judith's file, if ever?**

Thursday, January 15, 2015

Lawyer as Preventive Legal Health Care Provider

The last module will focus on Preventive Legal Practice. Key concepts include the lawyer's role as preventive health care provider, making a law office a client classroom, symptomatic and asymptomatic legal angina, and building a preventive tool box.

Readings:

- Barton, T., *Preventive Law and Problem Solving: Lawyering for the Future*, Vandeplass 2009
- "Creating a Mediation Friendly Environment," in Mosten, F. S. *Mediation Career Guide: A Strategic Approach to Building a Successful Practice*. Jossey-Bass, 2001 (Skim)
- "Preventing Future Conflict" in Mosten and Scully, *Complete Guide to Mediation* 2nd Edition (ABA 2015, Publication Forthcoming)
- Preventive Legal Personal Legal Wellness Check-up

Class Exercise: Conduct a Preventive Personal Legal Wellness Check-up