

NEGOTIATION/ MEDIATION Syllabus

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About the Course. As a lawyer, you will find yourself negotiating all the time—with opposing counsel, regulators and experts, and even your own clients and colleagues. When you share roughly compatible goals, assess fairness similarly, and/or have strong, positive relationships, these negotiations are likely to proceed quite smoothly and amicably. In fact, you may not even think to describe these interactions as “negotiations” because you will not experience any sense of difference. Any negotiation, however, has the potential to become difficult. This is also true for legal negotiation. Most of the time, you will conduct these negotiations without the help of a third party and outside the presence of your client. At times, you will negotiate in the context of a judicial settlement conference, mediation, and/or a negotiation that includes your client.

In order to be successful in legal negotiation and mediation, it is important to understand and internalize your role as a lawyer and the legal and ethical constraints and aspirations under which you will operate. You also will need to have a conceptual understanding of the structure(s) of these processes, recognize your own innate strengths and limitations, and develop your skills. This course will address all of these elements. Reading and applying relevant ethics and court rules, case law, psychological and economic research, engaging in hands-on experience (through simulations and in-class exercises), and both personal and joint reflection will be essential components of the course. To help you envision your role and choices in negotiation and mediation, we will use some videos and hear from practicing lawyers and judges. I hope that you will find the course relevant, useful, and thought-provoking. I intend to structure it to foster your opportunities to learn and grow as soon-to-be professionals.

More concretely, by the end of the semester, I expect that you will be able to:

- understand and internalize the ethical rules for attorneys serving as negotiators and representing clients in mediation;
- understand and apply the law of negotiation, settlement and mediation;
- prepare effectively for negotiation (with special focus on identifying your client’s key interests, determining an accurate reservation point and justifiable aspiration, and understanding your bargaining range);
- assess when a particular negotiation strategy, or sequence of strategies, is appropriate;
- learn to recognize and capitalize on opportunities for negotiation and effectively prepare for such negotiations;
- understand and employ effective negotiation techniques and tactics--some of which tend to be associated more with an adversarial strategy (e.g., making first offers/demands, managing concessions, using persuasive techniques to influence the other negotiator’s estimate of your and his reservation point, and ultimately claiming a healthy share of that range as your own) or a problem-solving strategy (e.g., asking questions and listening for underlying interests, communicating a willingness and ability to problem-solve, encouraging problem-solving by the other negotiator, finding creative and not-so-creative ways to expand the bargaining zone);
- understand and employ an effective tit-for-tat negotiation approach;
- understand and employ an effective negotiation style (e.g., competitive/aggressive, cooperative);

- understand the value of your reputation and behave in a manner consistent with what you want your reputation to be;
- understand and employ effective strategies in preparing your client for negotiation or mediation and representing him/her within the process;
- understand and effectively employ various technologies (e.g., email, videoconferencing, etc.) that may be used for negotiating and mediating;
- understand and address the special challenges presented when you anticipate significant cultural differences—and also when you don’t anticipate them but they nonetheless exist; and
- draft a negotiated or mediated agreement.

Materials. The required materials for this course are:

- DISPUTE RESOLUTION AND LAWYERS, 5TH ED. (referred to in the reading assignments as “DRL5”);
- Other materials and articles placed on ANGEL;
- General and confidential information for simulations and exercises placed on ANGEL.

There are many good books on negotiation. A foundational book is ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN*, 2d ed.

Availability. I will announce my office hours for this semester. You should feel free to stop by in person, call, or schedule a videoconference during these times. I am most likely to be available to you then. But I also encourage you to stop by/call or schedule an appointment outside of office hours. My office is located in Room 255 in Katz Hall in Carlisle. My office telephone number is 717-241-3508. You can reach me through ANGEL or at nxw10@psu.edu. I also will plan to stay for about 10 minutes after class ends, to talk as needed.

Videoconferencing Protocol. In order to enhance our sense of being participants in one unified class, I want to be sure that we can easily see each other. Therefore, I may require that you sit in chairs that are within our cameras’ “zone of vision.” Also, whenever you are in the remote classroom and would like to ask or answer a question or raise a comment, please press the button to make the camera zoom in on you. Do **not** rely on raising your hand. I am very unlikely to see this. Last, during class discussion, I expect to alternate relatively equally between Carlisle and UP. I am willing to “cold call.” Please be ready to participate.

Throughout the course, students in Carlisle and UP will negotiate cross-campus with each other using the equipment in the conference rooms. Please consider how to make this technology work as well as possible for you--and even how to exploit its capacities. I welcome your ideas about the use of videoconferencing, other technology and interactions with other students throughout the semester—as well as your criticisms, ideally accompanied by your suggestions to deal with problems that have arisen.

Negotiation Marathon. On Saturday, November 1, we will conduct a Negotiation Marathon that will be open to all students in the law school. Joe Barrett, who is the Administrative Supervisor and Coordinator of the ADR Program at the U.S. District Court of the Middle District of Pennsylvania, will assist with the Marathon. The Marathon will involve a series of three simulations (two will involve negotiation, while the third will involve mediation). You will play a role in all of these simulations, and (to the extent possible) will be paired with members of the class who are not in the same location as you.

Practicing lawyers and judges (most of whom have been nominated by other practicing lawyers and judges in this region as among the most effective and trustworthy legal negotiators with whom they have dealt) will observe and provide feedback. You will also have the opportunity to talk with these judge-mentors about their areas of practice, etc. I expect that the Marathon will feature a lunch presentation or roundtable regarding the role of negotiation and mediation in current legal practice. The Marathon will take place in Carlisle. ***Your attendance at the Negotiation Marathon is required for this course.***

Attendance, Preparation and Access to Recordings. Your regular and punctual class attendance and thorough preparation are essential for this class. In nearly every class, we will conduct a simulation and use it to evaluate and apply concepts in the reading for that and previous classes. Failure to attend obviously has a negative effect on those with whom you were supposed to negotiate or mediate. In addition, failure to prepare is self-defeating, unprofessional and will represent a disservice to the colleagues and classmates who are relying on you. Let's work together to make this course as useful as possible.

If you must miss a class, please email me as far in advance as possible so that we can make necessary adjustments. For several simulations, I will expect you to complete pre-negotiation reports on ANGEL before class. These reports will help you prepare and apply the concepts you will read about for class. You will also complete post-negotiation reports for several simulations. Both sets of reports will help me to assess students' understanding of key concepts and skill development. You should also expect to conduct traditional legal research prior to some negotiation sessions.

As you know, our classes are automatically recorded. Once you are practicing law, you are very unlikely to be able to get a recording of a meeting (with your colleagues at the firm, with a client, with a judge, etc.) you missed. Instead, you will need to review documents and talk with colleagues about what happened. Nonetheless, you may request permission to view the recording for one or more of our classes. When you request such permission, you will need to provide your reason(s) for requesting permission and your certification that you have already reviewed the slides available on ANGEL and discussed the class with at least one other classmate. For questions about the law school's general academic policies, including those regarding class attendance and recording, contact Senior Associate Dean Marie Reilly or Associate Dean Carla Pratt. My ultimate goal is to enhance your understanding and skillful use of the material presented in this class, as well as our ability to learn as much as possible from each other.

Laptops, Tablets, Cell Phones, Etc. Obviously, all of us have become accustomed to receiving multiple and simultaneous sources of stimulation at any time. However, using one's laptop or tablet or other devices during class to surf the internet, check e-mail or Facebook, text, contribute to a blog, adjust the roster of your fantasy sports team, and play games is both distracting and unprofessional. Recent studies have established multi-tasking can even be a significant impediment to learning, particularly for the higher order cognitive skills that ought to characterize an upper level law school classroom. Accordingly, the use of smartphones and cellphones is banned, and the use of laptops and tablets is limited to *accessing materials on ANGEL or take class notes*. I may, at my election, entirely ban the use of laptops and tablets for any class period.

Assignments. The *tentative* reading assignments are attached. They will be updated periodically. I will keep the most-recently updated list of reading assignments on ANGEL in a file labeled "General Course Materials." Unless I clearly say otherwise, assume that we will cover the next assignment in the next class. Please note that not all of the reading assignments are of equal length.

Evaluation. Your grade in this course will be based on the following components:

- Your choice of:
 - 1) ten-page pre-mediation submission OR
 - 2) performance in final videotaped negotiation simulation 30 points
- Final take-home examination on legal and ethical issues (anonymous grading) 25 points
- Class participation/contribution/preparation/feedback to colleagues 20 points
- Negotiated agreement drafting exercise (anonymous grading) 10 points
- An objective measurement of your results in two negotiations (5 points each) 10 points
- Reputation Index 5 points

Videotaped Negotiations. Very early in the semester, you will schedule and participate in your *first* videotaped negotiation. You may choose your partner for this negotiation. Based on your experience in the negotiation and a review of your digitized video, you will establish goals for yourself in this course. You will submit a self-assessment and statement of goals to me through ANGEL.

Midway through Part III of the course, you will schedule, prepare for and participate in a *second* videotaped negotiation. I will assign your partner for this negotiation. Before the negotiation, you will submit your preparatory materials to me through ANGEL. After the negotiation, you will submit a short self-reflection. You, your negotiating partner and I will schedule an hour-long meeting to review your video and to discuss any questions you have regarding your preparation, choice of approach, techniques, etc. We also will use your goal statements and self-reflection to guide our discussion. After our meeting, you will submit a new goal statement to me through ANGEL.

Near the end of the semester, you will schedule and participate in a *third* and final videotaped negotiation. Before I assign partners for this negotiation, you will elect whether or not this performance will be part of your final grade or whether you will write the pre-mediation submission.

Pre-Mediation Submission. *Prior to* the third and final negotiation simulation, if you elect not to have your performance in the final videotaped negotiation be part of your final grade, you will write a pre-mediation submission, advising the mediator regarding the relevant facts and law for your case, your client's legal position, settlement considerations, how the mediation could be helpful, etc. You will reference relevant legal, ethical and socio-psychological insights to help the mediator understand the bases for your substantive and procedural recommendations. In evaluating this submission, I will consider whether it demonstrates sufficient legal research and understanding, as well as thorough understanding and application of the legal, ethical and socio-psychological concepts that we have covered in class and are relevant to the case. I will also consider the quality of the submission's organization and writing. The submission must be single-spaced, use a 12-point font and endnotes, and have 1-inch margins. It may be up to 10 pages long. Cites to relevant cases or social science research should be included in the text of the submission. You should remember that your client may also review the submission.

Take-Home Examination. Because this course combines traditional substantive law and ethics with skills, I will also require you to complete a take-home examination focusing on the legal and ethical issues in negotiation and/or mediation. This will look like a normal law school exam. In evaluating your

answers, I will consider your grasp of the law and ethical requirements, your focused application of these concepts, and the quality of your writing. This examination will be available to you until the end of the exam period, though you will be required to complete it within 24 hours after you access it on ANGEL. Grading will be anonymous.

Class Participation/Contribution/Feedback. You will be evaluated on the *quality* of your contributions and insights in class. A quality comment usually possesses one or more of the following attributes:

- offers a unique and relevant insight;
- builds helpfully on other comments;
- contributes to moving the discussion and analysis forward--includes evidence, demonstrates recognition of concepts we are studying, integrates those concepts with reflective thinking.

Similarly, for your feedback to colleagues, you will be evaluated on the *quality* of such feedback.

Quality feedback generally:

- is honest and respectful;
- includes positive *and* constructively negative feedback (e.g., includes a suggestion of other language or other behavior that might have worked better for your character in a simulation);
- is specific (i.e., identifies the specific language or behavior that triggered your observations);
- relates to the concepts we are studying.

Ultimately, your colleagues should learn from your feedback to them and your contributions in class. Similarly, you should learn from your colleagues. Classroom participation/contribution/preparation accounts for 20 of the 100 points that I will use to calculate your final grade. I may deduct up to the full 20 points for excessive absences, absences without notice, poor preparation, failure to submit required reports, lack of timeliness, inappropriate use of laptops or tablets, etc. (see “Attendance, Preparation and Access to Recordings” and “Laptops, Tablets, Cell Phones, Etc.” above). As part of the Reputation Index (described below), I will ask for your colleagues’ assessment of your contribution to their learning. I will consider this assessment as I assign your points for class participation/contribution/preparation/feedback.

Graded Outcomes and Reputation Index. I encourage everyone to experiment in this class, make mistakes, and try out new approaches and techniques. That’s how you learn and improve. At the same time, in the real world, you will both develop a general reputation and be judged by your results in particular cases. This course will simulate the real world by taking both into account to some degree. First, I will consider your score on a Reputation Index, which was originally created for use in business school negotiation courses but is increasingly being used in law school classes. The Index is a proxy for the long-term effects of reputations created by negotiation activities in organizations, where the negotiations you conduct today affect others’ perceptions of you and expectations. The Index recognizes that lawyers who have reputations as effective and trustworthy negotiators are likely to have an advantage in future negotiations, and those who have reputations as untrustworthy and/or ineffective are likely to be at a disadvantage. The Index asks class members to identify peers in the class with positive and negative negotiation reputations. These nominations will then be converted into a point distribution.

Second, for two negotiation simulations (which may or may not be designated beforehand), you will be graded based on your objective results, including how they compare with the results of others playing the same role, and the extent to which they achieve and protect your client’s interests, recognize the scope and limits of your authority, and are consistent with relevant legal and ethical constraints. These results

may be assessed on an individual or group basis.

Negotiated or Mediated Agreement Drafting Exercise. After you have completed one of the simulations, you and your negotiating counterpart (and, if appropriate, the mediator) will be required to draft the resulting agreement jointly. You may research forms that are used for these types of agreements. Indeed, I recommend that you do so even *before* you conduct your negotiation or mediation. You may even need to resume your negotiation or mediation in order to discuss additional terms or clarify existing terms. Grading of this exercise will be anonymous. You will be graded based on the completeness, clarity, and administrability of your agreement as well as the quality of writing demonstrated. I also will consider whether the agreement sufficiently achieves and protects the various clients' interests, recognizes the scope and limits of the lawyers' authority (if you are negotiating as a lawyer), and appropriately handles any relevant legal and ethical issues.

A Final Comment. As the practice of law evolves, so too does the practice (and resulting law and ethics) of negotiation and mediation. Not surprisingly, then, this course is always under development. Your ideas for improvements will be much-appreciated at *any* point during the semester--not only when it is time to complete the evaluation form. I look forward to working with all of you.

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