

SYLLABUS

Mediation 461A – Fall 2021

Wednesdays from 4 pm – 7 pm

Commencing September 22, 2021 through November 24, 2021

Professor Bart J. Carey

Required textbook: Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016.

Required text: Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013.

Students will be expected to be familiar with the assigned reading. In addition to the assigned reading there will be outside research, projects, case briefing and opportunities for extra-credit. It is expected outside preparation will consume a minimum of two hours for every one hour in class.

In this skills course, your professor will not lecture directly from the text, but will instead bring the text to life by using guest speakers, demonstrations, thought problems and specific exercises. Students are expected to draw on the reading materials to navigate through the obstacles presented and to contribute to class exercises.

Learning Objectives:

- a. Students will demonstrate the development of mediation practice skills for both mediator's and client representatives in the areas set forth under the weekly CLASS TOPICS, below.
- b. Students will demonstrate the ability to identify the factual and legal issues implicated by a fact pattern and, as mediator, to appropriately fashion process strategies and, as client representatives, to fashion appropriate client representation strategies.
- c. Students will demonstrate the ability to locate relevant legal authority and case law regarding mediation process confidentiality, ethics and evidentiary privileges using a variety of book and electronic resources, and to properly cite to such legal authority.
- d. Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate for a mediator to effectively convey the client or speaker's ideas in a mediation session. This includes audience sensitivity in written and oral communication (the ability to adopt a tone, style and level of detail appropriate to the needs, knowledge and expertise of the audience); and written communication basic proficiency (the ability to use the conventions of grammar, spelling, punctuation, diction and usage appropriate to the task and sufficient to convey effectively the author's ideas).
- e. Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory

authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate the public policies of a precedent case or rule and their implications, and be able to assert such appropriate arguments to support a particular application or distinction of a precedent case to a legal controversy or a particular resolution of the application of a rule to the legal controversy.

f. Students will demonstrate an awareness of clients' needs and goals, including a sensitivity to clients' background and circumstances (including, but not limited to, socio-economic, gender, race, ethnicity, educational, disability and/or religious background(s)), the ability to make decisions that reflect an appropriate focus on those needs and goals, and awareness that cultural issues may affect the relevance of facts and application of the law.

g. Students will demonstrate the ability to identify ethical issues in mediation practice contexts and make appropriate decisions to resolve such issues.

Grades: This is a skills course with an emphasis on demonstrating knowledge and application of the principles of mediation. Class time will be devoted to learning both the theory and application of mediation through lectures, in-class exercises, role playing, and debriefing and analysis of challenging issues. Being present and actively engaged in discussions is required. One half [50%] of your grade will be based upon in-class participation, which includes the end-of-semester 'mock mediations,' with your role-playing both 'mediators' and 'clients'. There will also be a take home final exam which will count for the remaining one half [50%] of your final grade.

Extra Credit: It is the professor's practice in this class to offer learning opportunities by which students can earn extra credit. Such opportunities will be assigned as agreed in advance, between each student and the professors.

Absence Policy: This skills class puts a premium on *actually being present and participating in discussions*. Therefore, overall participation is one half of your grade and attendance is a percentage of the participation grade. In a 30 hour course, up to 3 hours absence [one evening] may not affect your overall participation grade, and thus will not be counted against the percentage attributable to attendance. More than 3 hours absence, however, must be excused by your professor. Caveat: Even a 3 hour absence may significantly affect your participation grade in other ways, e.g., your participation in the mock mediation, which will be important to your overall participation grade. Please work with your Professors regarding any anticipated absences.

Week #1 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - - A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTER ONE
- Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 1.

- Handouts from other texts/sources as provided in class

CLASS TOPICS: Importance of class participation/Introduction to Processes
Different negotiation approaches

- positional or evaluative approach
- integrative or facilitative approach
- application of approaches to Family Law vs. Business Law
- focus on role of “advocate” in mediation as well as the mediator’s role

Week #2 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTERS TWO and THREE
- Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 2.
- Handouts from other texts/sources as provided in class

CLASS TOPICS: Structure and Stages of Mediation

- Considerations of social context/traps
- Psychological considerations/traps
- Tactics/Biases
- Considerations regarding the roles of Lawyers in mediation

Week #3 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTER FOUR
- Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 3.
- Handouts from other texts/sources as provided in class

CLASS TOPICS: Preparing to mediate positional and integrated models

- Psychology
- Goals, Interests and Concerns
- Basic Planning Considerations

- Convening the Parties/ Commitment
- Joint v. Caucus Sessions
- Framing/Reframing/Looping
- The Problem to Solve
- Whose Problem to Solve?

Week #4 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - - A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTERS SEVEN

Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 4.

- Handouts from other texts/sources as provided in class

CLASS TOPICS: Basics of working at the table

- Offer/Counteroffer
- Justifications and Persuasion
- Objective v. Subjective Factors
- Tactics, Good and Bad
- Apologies
- Interests and Meaning
- Going below the line

SPRING BREAK WEEK: March 12 – 17, 2016

Week # 5 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - - A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTERS FIVE and SIX
- Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 5.
- Handouts from other texts/sources as provided in class

CLASS TOPICS: Gathering & Sharing Information – How, with Whom & Why

- Goals, Interests & Concerns
- Gathering Information
- Questions
- Impediments

- Role of Motivation
- Shifting Perspectives
- Right –Wrong Trap
- Mediator’ Frame

Week #6 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTER NINE

Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 6

- Handouts from other texts/sources as provided in class

CLASS TOPICS: Negotiators and Mediators

- An Integrated Approach
- Specific Problems
- Social Science
- Mediator Proposals
- The Role of the Law
- To Caucus or Not to Caucus

Week # 7 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTERS TEN and ELEVEN

Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 7.

- Handouts from other texts/sources as provided in class

CLASS TOPICS: Complexities and the Power of Neutrality

- Positive Neutrality
- Lawyers
- Past as Prelude
- Validation
- Emotions and Neutrality
- Mutuality
- Creating Value and Options

Week #8 READING:

- Paul J. Zwier/Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice - – A Realistic Integrated Approach*, Second Edition, National Institute for Trial Advocacy, 2016. CHAPTER TWELVE

Abramson, *Mediation Representation, Advocating as a Problem Solver*, Third Edition, 2013, Introduction and Chapter 8.

- Handouts from other texts/sources as provided in class

CLASS TOPICS: Settlement and Ethics

- Creating settlement proposals
- Experts
- Testing Proposals
- Mediator Proposals
- Acceptance/Closure
- Ethics

deliver opening statements (role play) in joint session

- enlist mediator's support

Week #9 NO READING: Mock Mediations

CLASS TOPICS: Mock Mediations

Week #10 NO READING.

CLASS TOPICS: Mock Mediations.

FINAL EXAMS: Take Home Exams Handed out at end of class.

DISABILITY SERVICES STATEMENT:

- **Western State College of Law provides accommodations to qualified students with disabilities. The Disabilities Services Office assists qualified students with disabilities in acquiring reasonable and appropriate accommodations and in supporting equal access to services, programs, and activities at Western State College of Law.**

- **To seek reasonable accommodations, a student must contact Senior Assistant Dean Donna Espinoza, Student Services Director and Disabilities Services Coordinator, whose office is in the Students Services Suite. Dean Espinoza's phone number and email address are: (714) 459-1117; despinoza@wsulaw.edu. When seeking accommodations, a student should notify Dean Espinoza of her or his specific limitations and, if known, her or his specific requested accommodations. Students**

who seek accommodations will be asked to supply medical documentation of the need for accommodation. Classroom accommodations are not retroactive but are effective only upon the student sharing approved accommodations with the instructor or professor. Therefore, students are encouraged to request accommodations as early as feasible with Dean Espinoza to allow for time to gather necessary documentation. If you have a concern or complaint in this regard, please notify Dean Espinoza; or please notify Dean Allen Easley at aeasley@wsulaw.edu or (714) 459-1168. Complaints will be handled in accordance with the College of Law's "Policy against Discrimination and Harassment."

Western State College of Law – Programmatic Learning Outcomes

Western State College of Law's curriculum is designed so that every student achieves a level of competency prior to graduation in each of the eight Programmatic Learning Outcomes listed below:

(1) Doctrinal Knowledge

Students will demonstrate knowledge of substantive and procedural law in the core curriculum subjects, including Contracts, Criminal Law, Criminal Procedure, Torts, Real Property, Business Association, Evidence, Civil Procedures, Constitutional Law, Estates, Community Property, Remedies, and Professional Responsibility.

(2) Practice Skills

Students will demonstrate the development of other law practice skills. Each student's chosen outcomes within this category will be varied based on the student's particular interests, coursework and work experiences. They may include, but are not limited to, the following topics: oral presentation and advocacy; interviewing; counseling; client service and business development; negotiations, mediation, arbitration, or other alternate dispute resolution methods; advanced legal research and writing (excluding purely academic papers and the first four units earned in introductory first-year legal research and writing class); applied legal writing such as drafting contracts, pleadings, other legal instruments; law practice management or the use of technology in law practice; cultural competency; collaboration or project management; financial analysis, such as accounting, budgeting project management, and valuation; cost benefit analysis in administrative agencies; use of technology, data analyses, or predictive coding; business strategy and behavior; pre-trial preparation, fact investigation, such as discovery, e-discovery, motion practice, assessing evidence, or utilizing experts; trial practice; professional civility and applied ethics; a law clinic that includes a classroom component; or a legal externship that includes a classroom component.

(3) Legal Analysis

Students will demonstrate the ability to identify the factual and legal issues implicated by a fact pattern and to appropriately use cases (including identifying the salient features of an appropriate precedent case, identifying legally significant similarities or differences between the precedent case and a fact pattern and

explaining why those are legally significant) and rules (including the ability to connect legally significant facts in a fact pattern to the rule) to predict how a court would decide the issue. Students will also demonstrate the ability to identify and evaluate the public policies of a precedent case or rule, and be able to evaluate how public policy can impact the application of a rule to the legal issue.

(4) Legal Research

Students will demonstrate the ability to locate relevant legal authority using a variety of book and electronic resources, and to properly cite to such legal authority.

(5) Communication

Students will demonstrate the ability to communicate both orally and in writing in a manner appropriate to a particular task to effectively convey the author or speaker's ideas. This includes audience sensitivity in written and oral communication (the ability to adopt a tone, style and level of detail appropriate to the needs, knowledge and expertise of the audience); and written communication basic proficiency (the ability to use the conventions of grammar, spelling, punctuation, diction and usage appropriate to the task and sufficient to convey effectively the author's ideas).

(6) Advocacy of Legal Argument

Students will demonstrate the ability, in both oral and written formats, to evaluate the legal, economic and social strengths and weaknesses of a case and use case and statutory authority as well as public policy to persuade others. Making policy-based arguments includes the ability to identify and evaluate the public policies of a precedent case or rule and their implications, and be able to assert such appropriate arguments to support a particular application or distinction of a precedent case to a legal controversy or a particular resolution of the application of a rule to the legal controversy.

(7) Client Sensitivity and Cultural Competency

Students will demonstrate an awareness of clients' needs and goals, including a sensitivity to clients' background and circumstances (including, but not limited to, socio-economic, gender, race, ethnicity, educational, disability and/or religious background(s)), the ability to make decisions that reflect an appropriate focus on those needs and goals, and awareness that cultural issues may affect the relevance of facts and application of the law.

(8) Legal Ethics

Students will demonstrate the ability to identify ethical issues in law practice contexts and make appropriate decisions to resolve such issues.