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Syllabus—Spring 2010

Text: **The Practice of Mediation, A Video-Integrated Text**, Douglas N. Frenkel & James H. Stark, Wolters Kluwer, 2008 (Aspen Publishers)

This clinical experience will introduce you to the process of mediation, the facilitation of negotiated agreements between disputing or transacting parties. You will study theories of conflict, negotiation and mediation and learn the skills used in the mediation process, both for mediators and for parties and their representatives. You will also be mediating live disputes at various community placements. There you will hone your skills as a mediator. The theory part of this course includes many short exercises, role plays and simulations. You will be required to demonstrate your proficiency as a mediator, both in your placement and in a video of a simulated dispute. In addition, you will need to do a public presentation on mediation to a local group. There is no final exam.

REQUIREMENTS

Attendance

Attendance at clinic seminars and placements is mandatory.

Pre-semester training

Prior to the beginning of the semester, you will participate in a mandatory 5-day training program in mediation theory and practice provided by Saltman Center faculty and trainers from the Neighborhood Justice Center.

Mediation Placements

During the course of the semester, besides attending the weekly 3-hour seminar, you will be assigned to a community placement for four hours a week, where you will mediate live disputes under supervision. We will critique you at the end of each placement session, letting you know what you are doing well and where you might improve your mediating skills. The immediacy of this debriefing will be of immense help in helping you grow as a mediator. If you are unable to go to your placement, please call me as far in advance as you can. You will need to make arrangements to make it up.

Journaling

The journal requirement is one of the most important components of the clinic. As the practice of law has become more and more bottom line-oriented, there are fewer opportunities than ever for beginning lawyers to be mentored by experienced ones. The main purpose of the journal is to contribute to your ability to learn from your own experience, by engaging you in a process of careful mediation planning and thoughtful post-mediation self-criticism and analysis. The journal is also a means to help me monitor your experiences when you are working with others, to maximize your learning throughout the semester.

Journal entries should be submitted on a regular, every-other-week basis, on dates to be announced. I expect you to accumulate at least 40 pages of journal entries over the life of the course (including the first five training days of the semester) -the equivalent of about three pages per week. This is not a daunting requirement if you keep up with it.

Journal entries may include analytical or subjective reactions to the readings and to topics raised in class; observations about observed role plays in class in which you are not involved; observations regarding observed mediations and other dispute resolution processes in the field; and-- especially-- reflections about your own mediations (both real and simulated), including dispute and disputant dynamics, ethical issues encountered, feelings elicited and the like; and, perhaps most importantly, your own self-critique of your skills and development. Focus both on what you did well and what you would do differently if you could do the mediation again. If you think you've learned something about yourself or the mediation process as the result of a particular experience, say so. The best journals, I have found, involve significant personal introspection and growth.

Journal entries should be a blend of the descriptive and the analytic. Do not simply describe events without reflecting on them. By the same token, do not make conclusory comments about events without providing enough detail so that your reflections are meaningful to the reader. Put differently, in describing the mediations you have conducted, it may be helpful if you briefly set forth the "facts" (positions, interests, concession patterns, agreement, if any, etc.) of the dispute so that the reader has a context to understand your reflections. But your entries should be primarily analytical, focusing on particular themes that capture your interest. I will treat all journal entries as confidential, although if you write something especially interesting or provocative, I may seek your permission to share it with the class.

Possible Journal Topics. Here is a (non-exclusive) list of both general and specific topics that you may wish to address in your journals. These are provided as a *suggestion* of things you may want to write about, but any other topics that interest you are also fair game. You cannot possibly cover all, or even many, of these topics in anyone journal entry! I would much prefer an in-depth analysis of a few issues in each journal entry, rather than a discussion that is a "mile wide and an inch deep."

- *Preparation.* Where planning for the mediation was possible, did I ("I" means "we" where appropriate) prepare adequately? Did I take time to review the pleadings and anticipate the legal issues? Did I correctly predict the conflict dynamics? What came up in the mediation that surprised me? Could it have been anticipated with better planning? Was this case appropriate for mediation? Was I competent to mediate it? Was enough time allocated for the mediation? If not, what effect did time constraints have on the process or result?

- *Opening the Mediation.* Did I make good decisions about who should attend the mediation? Was my opening statement fluent? Reasonably complete? Understandable? Were the parties initially comfortable with the process? Did I take steps to make them comfortable? Did I answer their questions effectively? In retrospect, what should I have done differently?
- *Initial Party Openings.* How well did I manage initial party narratives? What impediments got in the way? Did I give the parties space to tell their stories? Did I use open-ended questioning, active listening and summarization to make them feel heard? Did I deal effectively with any difficult behaviors, from the parties or their lawyers, effectively? Did I utilize a process of exchange? In retrospect, what should I have done differently?
- *Information Expansion.* How well did I develop the information base of the dispute? What impediments got in the way? How broadly or narrowly was the "problem" defined? Why? Did I effectively flesh out missing or difficult-to-understand parts of the disputants' stories? Did I make effective choices about how much time to spend on exploring the past versus the future? Did I use topical and chronological questions effectively to probe other aspects of the dispute that the parties did not mention? Are there mediation topics that I am more or less comfortable pursuing? Why? In retrospect, was there any further information that it would have been useful to get out on the table? Did I make effective choices about whether to caucus for information or not, when, and with whom to begin? How did my information expanding efforts affect the process or the outcome?
- *Listening and Note-taking.* Throughout the mediation, did I listen well? If not, what got in the way? What can I do to improve my listening? Was my note-taking effective? What kinds of notes do I need to take in order to be effective as a mediator?
- *Framing Issues and Creating a Negotiation Agenda.* Did I identify all the negotiating issues in the case? Did time constraints or party dynamics cause me to "rule" certain issues out of bounds? Did I frame issues neutrally? Did I make good choices as to the ordering of the issues? What impact, if any, did these things have on the mediation process and/or outcome?
- *Persuasion.* Of the various persuasion devices discussed in Chapter Nine, which am I comfortable/not comfortable using? Why? How did this play out in this mediation? How can I work to increase my repertoire of persuasive interventions? Do I want to?
- *The Bargaining Process.* What positions did the parties take? What specific offers and counter-offers were made? What were the parties' underlying interests and did I identify them effectively? What were the main barriers to resolution in this case? What persuasive devices did I try to use to generate movement, and were these effective? Did I manage the actual bargaining process effectively? In retrospect, what if anything might have I done differently to assist the bargaining process and generate movement?

- *Joint Session Versus Caucusing.* What format(s) was/were used for information expansion and bargaining? Were the choices I made appropriate and effective in this case? Were caucuses managed effectively?
- *Impasse and Closing.* Did we reach impasse or settle? Either way, was the result surprising? Why? Was the closing stage of the process handled effectively? Did any issues, including drafting issues, arise?
- *Emotional Barriers.* Was this a mediation in which a lot of strong feelings were expressed? Am I comfortable dealing with strong emotions? Was I successful in thawing relationships and lowering the temperature of the dispute? What did I do to encourage the productive expression of emotions and discourage the destructive expression of emotions? In retrospect, should I have done anything differently?
- *Cognitive Barriers.* Did any cognitive barriers arise in this negotiation? How did they manifest themselves? How did I address them? In retrospect, should I have done anything differently?
- *Strategic Barriers.* Did any strategic barriers arise in this negotiation? How did they manifest themselves? How did I address them? In retrospect, should I have done anything differently?
- *Cultural Issues/Barriers.* Did any issues of race, culture or ethnicity arise in this mediation? How did I address them? In retrospect, should I have done anything differently?
- *Gender Issues.* Did any gender issues arise in this mediation? How did they manifest themselves? How did I address them? In retrospect, should I have done anything differently?
- *Conflict Management Styles.* Did the parties in this case, or their representatives, have contrasting conflict management styles? Conflict management styles different from my own? "Big picture" versus "little picture" focus? How did these dynamics affect the negotiations? How did I address them? Did my own conflict management style influence my management of the mediation? If so, how?
- *Lawyer Issues.* Were there lawyers in this case? In what ways were they a help? A hindrance? What can I learn about effective and ineffective mediation representation skills from their example? Did I deal with the lawyers in this case confidently? Effectively? In retrospect, should I have done anything differently?
- *Power Imbalances and Fairness.* Were there any significant power imbalances in this case? How did they manifest themselves? Did I take any steps to "balance" power? If so, what steps? Was the process "fair"? Was the result? In retrospect, should I have done anything differently?

- *Impartiality and Neutrality.* Did I *feel* impartial towards all parties and neutral about the outcome in this case? If not, why not? Did I *demonstrate* impartiality and neutrality at all times? If not, how might this have manifested itself? Did I favor one side over another? Did I steer one or both of the parties towards an outcome I preferred? In retrospect, should I have done anything differently?
- *Intimacy, Authoritativeness and Trust.* Throughout the mediation, was I effective in building intimacy and gaining the parties' confidence and trust? Was I authoritative? Warm? In retrospect, should I have done anything differently?
- *Other Ethical and Role Issues.* Did any other ethical or role questions arise in this mediation? What issues? How did I handle it/them? Is there anything I should have done differently?
- *Co-Mediation and Partnership Issues.* If I am co-mediating, is my co-mediation team working together effectively? How are we dividing up responsibilities? Are there other ways of dividing tasks that might be more effective? Is co-mediation advancing my progress as a mediator or impeding it? Are there any tensions in my partnership? If so, what steps have I taken or should I take to address them?
- *Overall Learning and Growth.* Am I making good progress as a mediator? What are my strengths and weaknesses? Are they the same I imagined they would be when I began the course? What steps can I take to improve in any areas of weakness and maximize my potential? Will the skills I am learning help me as a future lawyer? How?
- *Perspectives on Mediation, Adjudication, Lawyering and Justice.* Based on my experience in the clinic, what are my views about the place of mediation and adjudication as processes for resolving legal disputes? Have they changed since I began the course? Do I approve of or am I disappointed with mediation as it is practiced? With courts as they are managed and run? Based on what I have observed, what feelings do I have at this point about the quality of justice achieved in American courts? The quality of advocacy provided by lawyers? What values will I take away from my experience in this course?

Video evaluation

During the first two weeks of April you and a partner will schedule a time to be videotaped mediating a role-play scenario. It should run no longer than 45 minutes. You will work with students outside of the clinic as parties, and you will be evaluated on your skills as a mediator. The evaluation of

this video will constitute 25% of your final grade. More information on logistics will be given to you as the semester progresses.

Public presentation

You will be required to make a short (15-20 minute) speech to a local community group on the topic "What Is Mediation and How Might It Be Beneficial to You?" You may do this at any time after March 12. I encourage you to arrange the site of the presentation yourself, but if you have difficulty doing that I will assist you in finding a suitable venue. More information will be given to you as the semester progresses.

Grades

Your grade will be based on your evaluation by your mentors of your ability to mediate real cases (50%), an evaluation of your videotaped mediation (25%), your journal entries (15%), and the quality and quantity of your class participation (10%). I will factor unexcused absences, latenesses and an incomplete journal record into your participation grade, although I would hope this is not a problem, given our small numbers.

Office Hours

My office is Room 420 in the Rogers Building. I am generally there every day. You may just drop by, or you can call me (Office: 895-2333; Cell: 702-423-2239) or email me (ray.patterson@unlv.edu) to set up an appointment if you are having difficulty catching me in my office.

Seminar Topics

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| Class 1 | Read Chapter 1: <i>Introduction to the Processes of Mediation and the Skills of Effective Mediators</i> |
| Class 2 | Read Chapter 2: <i>Basics of Negotiation Theory and Why Negotiations Fail</i> |
| Class 3 | Read Chapter 3: <i>The Role of the Mediator: Differing Approaches, Fundamental Norms</i>
Watch Cheryl Cutrona and Craig Lord ("Play All") mediate <i>Wilson</i> . |
| Class 4 | Read Chapter 4: <i>Preparing to Mediate</i> |
| Class 5 | Read Chapter 5: <i>Mediation as a Structured Process</i> |
| Class 6 | Read Chapter 6: <i>Opening the Process, Developing Information</i>
Watch Harris Bock ("Play All") mediate <i>Resnick v. Stevens Realty</i> . Identify and evaluate all "persuasive" interventions. |

- Class 7 Read Chapter 7: *Expanding Information to Aid the Negotiations*
- Class 8 Read Chapter 8: *Identifying and Framing Negotiating Issues, Organizing an Agenda*
- Class 9 Read Chapter 9: *Generating Movement through Problem-Solving and Persuasion*
- Class 10 Read Chapter 10: *Conducting the Bargaining, Dealing with Impasse*
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- Class 11 Read Chapter 11: *Concluding the Mediation*
- Class 12 Read Chapter 12: *The Ethics of Mediating*
- Class 13 Read Chapter 13: *Representing Clients in Mediation*

DISABILITY STATEMENT

The Disability Resource Center (DRC) coordinates all academic accommodations for students with documented disabilities. The DRC is the official office to review and house disability documentation for students, and to provide them with an official Academic Accommodation Plan to present to the faculty if an accommodation is warranted. Faculty should not provide students accommodations without being in receipt of this plan.

UNLV complies with the provisions set forth in Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, offering reasonable accommodations to qualified students with documented disabilities. If you have a documented disability that may require accommodations, you will need to contact the DRC for the coordination of services. The DRC is located in the Student Services Complex (SSC), Room 143, and the contact numbers are: Voice (702) 895-0866, TTY (702) 895-0652, fax (702) 895-0651. For additional information, please visit: <http://studentlife.unlv.edu/disability/>.