

University of Cincinnati College of Law  
***Mediation Workshop***

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**Tuesday – Friday, January 11-14, 2011**

Required Text:

D. Golann, Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates, ABA Section on Dispute Resolution, 2009. (“Course Text”)

**Readings on TWEN**

All course readings other than the required text are available on this course’s TWEN site. Most assigned *Alternatives* articles are also available online at:  
<http://www3.interscience.wiley.com/journal/107640508/home>. *Conflict Resolution Quarterly* articles are at: <http://www3.interscience.wiley.com/journal/97519532/home>  
Articles from *Negotiation Journal* are at: <http://www.blackwell-synergy.com/loi/nejo>

**Readings Related to Mediation’s Legal Context:**

The TWEN site contains a collection of materials on mediation’s legal context: the rules and statutes pursuant to which mediation takes place, confidentiality, enforceability of agreements to mediate and settlements reached in mediation, and potential sources of mediator liability. Students will be asked to summarize these materials in class on January 12 or 13 and to apply them in various scenarios.

**Pre-Course Recruiting Assignment: PLEASE PLEASE PLEASE** start working on relatives and friends to give us half a day of service as clients on the morning of Friday, January 14. (Parents LOVE doing this and I can promise that you will NOT be the mediator in a group with your parents or other recruits.)

**Preparation for Day One**

Read:

Course Text, Chapters One and Two, and Appendix pages 341-347 (on mediation agreements and opening patter).

Kenneth Cloke, “The Dangers of Mediation,” Chapter One in Mediating Dangerously: The Frontiers of Conflict Resolution (Jossey-Bass, 2001), pp. 3-14.

Noll, “A Theory of Mediation,” 56 *Dispute Resolution Journal*, No. 2 (May/July 2001) 78-84.

Davis and Gadlin, “Mediators Gain Trust the Old Fashioned Way—We Earn It,” *Negotiation Journal* (Plenum Publishing, January 1988) pp. 55-62.

Lovenheim, “Humor, Trustworthiness, and Even Drama: Assessing Whether You Have What it Takes to Be a Mediator,” 20 *Alternatives* No. 9 (October 2002).

Riskin, “Mediator Orientations, Strategies and Techniques,” 10 *Alternatives* 111 (September 1994).

Aaron, “At First Glance: Maximizing the Mediator’s Initial Contact,” 20 *Alternatives*, Nos. 9 and 10, (November and December 2002)

Segments through Opening Patter in “What’s A Mediator to Do?: Practical Pointers” (2001) and “Mediation Practice Dos and Don’ts: Rules of the Road” (2001). You are welcome to skim the rest to get a sense of the mediation process from start to finish.

### **Relating to Legal Context**

ABA Model Rules of Professional Conduct: Rule 1.12, 2.4, 3.3, 4.1.

Ohio’s Uniform Mediation Act, passed in 2005.

ABA Section of Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law, Adopted by the Section on February 2, 2002.

Model Standards of Conduct for Mediators; Revised by a Joint Committee of AAA, ABA, and ACR; Adopted by all three organizations, effective September, 2005 (also in the Course Text, pages 348-365).

Robert A Bagley, Esq., Locke Lord Bissel & Liddell LLP, “Mediator Liability: A Snapshot,” provided to insured mediators, with policies issued through Lloyds of London, 2010).

### **Day One – January 11, 2011 9:00 – 5:00**

Introduction to the Whys and Whats of Mediation

JUST DO IT! Mediation Quickies

Birds’ Eye View of Barriers and Bridges

The Power and Importance of Neutrality Laying the Groundwork – Legal Context

Initial Contacts, because first moves matter

Setting the Scene – Beginning Patter, Rhetoric and Ground Rules

Let’s see what a real-fake mediation looks like at the movies!

### **Preparation for Day Two**

#### **Read:**

General information and assigned confidential information in case handout.  
Course Text: Chapters 3-7.

Balance of Aaron's 'What's A Mediator to Do?: Practical Pointers' (2001), and  
*Mediation Practice Do's and Don'ts: 'A Mediator's Rules of the Road'* (2001)

Moffitt, "Mediation 'Transparency' Helps Parties See Where They're Going," 16  
*Alternatives* No. 6 (June 1998).

Salem, "The Benefits of Empathetic Listening," *Conflict Research Consortium*,  
University of Colorado (2003); Curtis, "Reconciliation and the Role of Empathy, *ADR*  
*Personalities and Prac. Tips* 53-62 (1998); and Bryant and Curtis, Reframing  
(Unpublished, 2004) – All as excerpted in Golann, D. and Folberg, J. *Mediation: The*  
*Roles of Advocate and Neutral* (Aspen Publishers, 2005) 175 – 183.

Relyea, "The Critical Impact of Word Choice in Mediation," 16 *Alternatives* No. 9  
(October 1998).

Cloke, "Bringing Oxytocin into the Room: Notes on the Neurophysiology of Conflict",  
(January, 2009).

## **Day Two – January 12, 2011 9:00 – 5:00**

Joint Sessions in On-Going Cases  
Challenges of Joint Session – To Intervene or Not, and HOW  
Working WITH conflict, because there's no (mediation) work without it  
Early Caucusing – Essential Skills  
Later Caucusing – Bargaining to a Close (if we get there)

## **Preparation for Day Three**

ASSIGNMENT AFTER DAY TWO: WRITE AN APPROXIMATELY THREE PAGE  
ANALYSIS AND CRITIQUE OF YOUR MEDIATORS' SKILLS AND STRATEGIES, from  
the perspective of a mediation party or attorney. Provide at least a draft to your mediators on Day  
Three. (I understand that Day Two will have ended late and Day Three has a great deal of  
reading. So, it is fine with me if you just provide a rough draft or bullet points to your classmates  
on Day Three. You should give me a copy of that, just so that I know you did it. You are  
welcome to flesh out/edit the prose and turn it in with your final work. I will not grade it until  
final submissions.

## **Read:**

Vignettes handed out in class (on Day Two). Additional Role information, if any.

Course Text, Chapters 8 (pp 145-162), and 9. (Note that in Chapter 8, you need not read  
the portion discussing decision analysis. Of course, you are welcome to do so.)

Cooley & Love, "Midstream Mediator Evaluations and Informed Consent," 11-14  
*Dispute Resolution Magazine* (Winter 2008).

Kichaven, "Adding Value: Making the Strongest Case for Evaluation,"  
19 *Alternatives* 151 (June 2001).

Kichaven, "Evaluation: the Marketplace View on the Need for Mediator Evaluation,"  
*Alternatives* 26 (July/August 2008).

Pynchon, "The Cost of a Thing is Your Life," Blog at:  
<http://www.negotiationlawblog.com/2007/01/articles/negotiation/money/the-cost-of-a-thing-is-your-life/> (January 25, 2007).

Kichaven & Rothman, "Make it Funny: It's a Risk, But Humor Can Ease ADR Tension,"  
21 *Alternatives* 49 (March 2003).

Benjamin, "The Joy of Impasse: The Neuroscience of Insight and Creative Problem Solving," (February, 2009).

### **Day Three – Thursday, January 13, 2011 9:00 – 3:00**

Deconstructing to Refine Skills and Strategies  
Influence: Persuasion without Pressure  
On Evaluation and Neutrality  
Essential Skill: Shifting Perspective  
Moving to a Deal – When there's an Impasse to be Broken  
What About Never Caucusing?

### **Preparation for Day Four**

Read:

General information in *Pharma Fix*. Prepare to mediate.

Course Text, Chapter 13.

Goldberg, "Mediators Reveal Their Techniques for Successful Settlements [Part I of II]"  
24 *Alternatives* No. 5 (May 2006).

Goldberg and Shaw, "Further Investigation into the Secrets of Successful and Unsuccessful Mediators [Part II of II]," 26 *Alternatives* No.8 (September 2008).

Hoffman, "Ten Principles of Mediation Ethics," 18 *Alternatives* 147 (September 2000).

Geigerman, "20 Hits: Reminders of What Mediators Need to Do,"  
18 *Alternatives* 187 (October 2000).

Optional [I like this article but it is long and less strictly utilitarian]:

Bowling and Hoffman, "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation," 16 *Negotiation Journal* No. 5 (Jan. 2000).

**Day Four- Friday, January 14, 2011 9:00 – 3:00 p.m.**

Morning Mediation Marathon!

Afternoon Debriefing

Looking back at process to go forward

Ethical issues for mediators

Reflections on the lawyer's role (and dealing with counsel)

**BASIS FOR GRADE**

**30% - Class Participation (which includes your written mediator critiques)**

**TENTATIVE - TWO FINAL ASSIGNMENTS:**

**(Note: I am not 100% sure of these assignments, but they represent my current thinking. I promise not to create one that is worse!)**

**Assignment #1 – 35% of final grade**

Make two video clips, each one targeted to a different mediator skill or choice. You must play the mediator. Someone else (or more than one person) will have to play the other role(s). It is fine to work with classmates. Each video clip should reflect a poorly executed skill (done badly), or an ill-advised mediator choice, using one of the mediation cases we worked on in the class (or the case you choose for the final paper, described below). Then each clip should demonstrate how you would make a better mediator choice or execute the targeted skill perfectly. (In effect, you will end up with FOUR segments, choice/skill A, done badly and done well, then choice/skill B, done badly and done well.)

Write a short analysis (1-2 pages) of why you believe the mediator behaviors recorded were ineffective, what their consequences were and why, how you think you demonstrated the better skill or choice in the subsequent (good) clip, the consequences, and why you would anticipate these consequences. It's a great idea to reference appropriate readings in your analysis.

**Assignment #2 Short Paper - approximately 7 pages – 35% of final grade**

Assume that you were mediating the real case of *Hospital Works* or *Water Woes* (to be handed out) and further assume that there were NO time constraints or money constraints.

Discuss, in some detail:

- What preparation work would you do with counsel and/or the parties before the mediation begins (to increase the likelihood that it will settle during the first scheduled session)? Why? What aspects of that preparation might be different than in other cases? What about this particular case would make that preparation particularly important? (suggested length – not more than 1 page)

- In view of that preparation, how exactly would you open the joint session? Even if you would not speak from a script in real life, please write out the script for what would be your remarks at the beginning of the joint session. (For the purposes of brevity, don't worry about reciting confidentiality or the mediation privilege.) Pay attention to the tone you would set, metaphors you might use, how you would frame the participants' tasks. Please write the script in italics. I am less interested in your "boiler plate" or standard patter, and more interested in particular choices you would make for this case. Then, commend upon why you may have chosen to emphasize certain topics and de-emphasize others, the framing choices you made etc, and why these are appropriate for the particular case and its participants. (Suggested length - up to 3 pages, including the dialogue and your comments)
- As you know, in most mediations, there comes a time when the participants shift from reviewing what happened to thinking about how to move forward, and how to negotiate for an optimal result. (You might consider when that moment occurred in your "real fake" mediation.) Assume that one party (you decide which one) seems stuck on the past. Consider the possible reason(s). Please write out the script for the dialog you might have with that party – how you would approach it, the initial response or push back you might anticipate from the party, how you would respond, and so forth. Your script should demonstrate an effective mediator-initiated dialogue that facilitates the participant's shifting direction and mindset. Briefly comment upon your choices in that written dialogue, why you think it would be effective with that participant, what concerns you might have. (Suggested length – up to 3 pages, including the dialogue and your comments.)

Please do reference readings, where appropriate. It's not necessary to cite the very basic readings about the structure of the process, etc. But if you're employing particular strategy or technique raised in an article, I strongly recommend it. (The prof. **LIKES** to know you've read the assigned articles.)