

**MEDIATION ADVOCACY SEMINAR  
PROFESSOR CATHY A. COSTANTINO  
SUMMER 2018, TERM 3  
JULY 13 – 15, 2018**

**1. ABOUT YOUR PROFESSOR**

Professor: Cathy A. Costantino, Esq.

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Office Hours: Scheduled upon request by email to professor.

**2. SUBSTANTIVE ASPECTS OF THIS COURSE**

**Course Description:**

Mediation is a core dispute resolution process, both within the context of courtroom and administrative litigation, as well as in the transactional context. Lawyers and clients are increasingly required to advocate in mediation, which is a different process and requires different skills than trial advocacy, negotiation or rule-making. This is true in multiple disputes, including environmental, commercial, employment, international, community, and public policy matters.

This course is an intensive, immersive, skills-oriented course designed to teach students in all disciplines how to advocate in mediation. Students should expect to be highly active during the entire three days of the course. In addition to lecture and discussion of mediation advocacy, students will be assigned to play both advocate and client roles during a simulated mediation of a complex civil dispute involving a small, tight-knit community, devastated by a mudslide. This mudslide is (perhaps) caused by the actions of the major employer in the community—a family-owned lumber business that employs many community members.

Students will use this single mediation problem throughout all three days of the course to learn the theory, principles, and practice of mediation advocacy by engaging in various exercises within this simulation, such as selecting the appropriate type of mediator for the dispute, preparing clients that have conflicting goals, and coalition-building among parties with competing goals within mediation. Students will develop hands-on skills that will help them recognize and capitalize on mediator tactics and prepare them to effectively advocate. At the end of this course, students should understand the strategy and tactics necessary to build effective mediated settlement agreements in a multi-party dispute. This course will also prepare students to recognize and handle ethical and confidentiality issues in mediation, as well as the difficulties involved in mediating and resolving a case where the parties will continue to maintain relationships, either in the community, business or regulatory context.

All of this will be accomplished by encouraging students to experiment with different mediation styles and techniques through the use of simulation and exercises that allow for student application of theory, principles, concepts, and practices as a mediation advocate. In order for this course to be effective, students will be required to prepare in advance for the class lecture and discussion, as well as the simulation. Students will be provided both general instructions for

the simulation, and confidential instructions for the role they are assigned, and they will be expected to read and understand their role, the law and facts provided to them, and spend significant time over the three days of the course in role of a client or advocate in mediation.

### **Course Goals/Objectives:**

You will be expected to read, write, discuss, and perform in this class. You will be required to apply what you learn through the readings, video clips, and discussions to your performance in the simulation exercise.

Through this course, students will:

- Develop and sharpen skills to be an effective advocate in mediation;
- Understand and evaluate strategies and tactics used by a mediator in order to determine the best strategy and tactic as a mediation advocate;
- Gain knowledge in the doctrinal and theoretical underpinnings of mediation advocacy;
- Use knowledge of an organized theoretical framework to analyze the issues of mediation advocacy through the use of a simulated mediation problem;
- Engage in effective problem-solving during different stages within the mediation advocacy simulation problem;
- Identify ethical considerations that may arise while acting as an advocate in mediation;
- Demonstrate professionalism in interactions with classmates and professors;
- Provide constructive feedback to classmates, and
- Engage in self-reflection and peer critique, including applying lessons learned.

### **Student Learning Outcomes:**

At the end of this course, students will be able to:

- Define mediation;
- Explain the role of a mediator;
- Decide whether a matter is appropriate for mediation;
- Explain the different types of mediation;
- Interview and select a mediator;
- Design the mediation process with the mediator;
- Develop a systematic process to prepare for and participate in a mediation;
- Develop an effective mediation advocacy plan;
- Deliver an effective opening statement in a mediation;
- Develop multiple options for possible resolution in mediation;
- Use a mediator proactively to influence other parties;
- Use a mediator proactively to break impasse;
- Work with a mediator and other parties to identify key settlement terms.

## **Textbook and Materials**

Sharing a Mediator's Powers: Dwight Golann (ABA Section of Dispute Resolution, 2013).  
The Syllabus, the Course Slides and the General Instructions for the Simulation are on TWEN.  
DVD Chapters can also be found at [http:// tinyurl.com/ Culture-Bubble](http://tinyurl.com/Culture-Bubble)

## **Grading/Assessment Plan:**

There is no final examination in this class. Your final grade will be based on three components:

- **Post-Course Reflective Journal Assignment – 5 pages (25%)**

**Due Date:** Students will write a reflective journal to be submitted no later than 11:59 pm (one minute before midnight) on Saturday July 21, 2018. As explained below, late submissions will not be accepted and will result in a failing grade in the class.

**Statement of Journal Requirements:** This journal should be self-reflective and analytical, discussing the concepts, theories, and principles of mediation advocacy, as applied to the skills and knowledge used during the entire simulation. Your journal will be graded on your ability to demonstrate your recognition and understanding of mediation advocacy concepts, theories, and principles from the textbook and lectures and tie those into a self-reflective evaluation of your performance during the simulation.

The substance of your journal should focus on the process of the mediation simulation. You should discuss and evaluate the outcomes of the different exercises in the mediation simulation in this journal assignment by discussing your application of mediation advocacy concepts, theories, and principles, as well as the skills you used during different phases of the mediation. You should discuss any challenges you faced, and the tactics you used to overcome those challenges. You are expected to discuss lessons learned, including specific examples of successful outcomes resulting from your advocacy, how you identified and responded to the mediation strategy and tactics imposed by the mediator, an opposing advocate, and/or the client or an opposing client. You may also consider discussing and evaluating feedback you received during the simulation.

Your journal should not be a simple listing of strategy or tactics from the lecture or textbook, nor should it be a factual recounting of the simulation without any analysis of mediation advocacy theory, principles, or concepts.

**Advanced Preparation for Journal Assignment:** As adult learners, it is up to you to decide how to best capture the information from the textbook, lecture, and simulation exercise necessary to write a meaningful, self-reflective journal that ties in lessons from the textbook, lecture, and your performance in the simulation. You are permitted and encouraged to take notes throughout the course. You are also encouraged to note and reflect on any feedback from the professor or classmates and incorporate that into your journal. Failure to tie your use of mediation advocacy concepts, theories, and principles to the tactics and strategies used in the simulation will result in the lowering of your journal grade.

- **Class Participation (25%)**

**Due Date:** You must attend all class sessions on time to pass this class. No credit for class participation will be awarded if final deliverables are submitted late, as explained below.

**Statement on Evaluation of Class Participation:** Students will be evaluated based on their participation in class discussions, as well as the simulation. Class participation will be graded on the student's ability to engage in discussion and simulation while showing respect for other members of the class. Students will be evaluated on their ability to support their contribution to meaningful class discussion by offering statements and arguments evidencing their analysis of readings from the textbook and video clips. Students will also be evaluated on whether they are prepared to participate in the simulation in a meaningful way and are familiar with the facts. This means that students should support their arguments and strategy or tactics displayed during the simulation with evidence from the readings, but also going beyond the text in their participation in the simulation, and must effectively advocate in individual and group scenarios. Students should respectfully listen to other students, and, where possible, clarify, respond to, and build on others comments. Students will also be evaluated on their ability to give and receive critiques during the simulation exercise in a meaningful and respectful manner.

**Advance Preparation for Class Participation:** It is strongly encouraged that you complete the required readings and view the accompanying video clips prior to class.

- **Final Paper, Mediation Advocacy Plan – 10 pages (50%)**

**Due Date:** Students will write a final paper which will be a Mediation Advocacy Plan to be submitted no later than 11:59 pm (one minute before midnight) on Saturday July 21, 2018. As explained below, late submissions will not be accepted and will result in a failing grade for the class.

**Statement on Final Paper Requirements:** Your final paper will set forth a Mediation Advocacy Plan for a current or recent conflict or dispute in the news or of a public nature. The plan will be from the attorney perspective (law students) or the client perspective (masters students) and will specifically set forth a framework to your client (i.e. your paper should be in the form of a client memo) for an entire mediation process, from preparation to conclusion. You should use all available resources for this class, including the syllabus for ideas and suggestions on paper organization, textbook for this class (in particular, chapters 11-14), lecture, as well as legal research on the substantive area of law of your dispute if you are a law student or policy research to develop your mediation plan.

In developing your mediation advocacy plan for your client, you should identify the stage that the dispute is currently in, such as whether the dispute is already in litigation or not, and include the reasons you recommend mediation to your client. The paper should also advise the client of the type of mediator you would want to mediate this dispute, as well as the design of the mediation best suited to the dispute from your client's perspective. Your plan should discuss any challenges you anticipate in initiating or persuading the parties to

mediate, and how you would overcome those challenges using mediation advocacy skills and concepts. Your plan should identify your client's interests, including why your clients interests are best served by mediation and the best and worst alternatives for your client to a mediated agreement. Papers should also set forth a plan for gathering information from other parties and giving information in the mediation session, and should discuss whether gathering or giving information will require the exchange of documents or the participation of an expert in the mediation session. You should discuss strategies you will employ with the mediator as an advocate. This plan should include identification of any legal, policy, or ethical issues you would expect to encounter, including any legal, policy or ethical issues that might affect your strategy or power in mediation, and your plan for overcoming any law or policy adverse to your position. Your paper must demonstrate an understanding of mediation advocacy, theory, practice, and principles, and apply them to the conflict/dispute you chose.

While there are no templates or required organization of your mediation advocacy plan, I expect that your paper will be organized as a client memo and present logically the recommendations for the mediation design you propose for your client. This means that you should discuss at least each segment of the mediation process discussed in class and contemplated in the textbook. Failure to discuss and evaluate a significant section or sections of the mediation process (or failure to indicate why a certain section need not be evaluated in the context of your dispute) will result in a lower grade on your paper. Failure to support any recommendations in your mediation advocacy plan with theories, principles, and concepts of mediation advocacy discussed in the lecture or reading materials will result in a lower grade on your paper. This memo may be to a client who is not a lawyer, so put all legal citations into footnotes (law students). Please do not use footnotes for discussion of concepts.

**Advanced Preparation for Final Paper:** Students are welcome to discuss potential paper topics with the instructor.

**Format:** All writing assignments will be typed, double-spaced, and in 12-point font. Please pay careful attention to details in your written products, as poor spelling, grammar, or syntax will lead to a lower grade. Given the intensive, three-day structure of this course, students will not receive information on class participation or class performance during the course.

### **Simulation Expectations:**

- Students will receive General Instructions for the Simulation (known to all parties) and Confidential Instructions (known only to you). Please do not disclose the confidential information you receive to other parties.
- Students should expect to be active during the entire course, and, in particular, during the simulation. Students are expected to participate in a meaningful way in their role in the simulation. Students will be divided into two groups of eight for the purpose of the simulation. The simulation is a four-party simulation, and each group will have one client and one advocate per party.

- Students may be asked to switch roles halfway through the simulation, with advocates becoming clients, and vice versa. You should consider, throughout the entire simulation, how you would approach the exercise from both the client and attorney perspective.
- There will be times when one group is acting in the simulation, and the other group is shadowing and observing the simulation. When they are not acting in a role in the simulation, students will be given guided feedback forms and are expected to shadow and observe a classmate assigned to them during the simulation and provide feedback to that student. Students will receive a grid in class showing their role(s) during the simulation, and a peer feedback grid detailing their feedback assignments during each simulation exercise where the student is expected to observe and provide peer feedback.
- Please commit to providing quality, meaningful, and honest feedback (not criticisms) to your fellow students during the simulation. This means carefully observing the assigned student and taking clear, legible notes on the feedback forms. Peer feedback is a critical piece of this course, and students will only benefit if they receive substantive feedback.
- Students will also be expected to learn to recognize, evaluate, and respond to strategies and tactics used by the mediator to encourage discussion and resolution of the dispute. Students will be expected to debrief mediator tactics and the advocate's response to them during the simulation.

### **3. COURSE POLICIES AND IMPORTANT REMINDERS**

#### **Schedule:**

Friday, July 13, 2018	12:45PM – 6:30PM
Saturday, July 14, 2018	8:30AM – 6:30PM
Sunday, July 15, 2018	8:30AM – 6:30PM

#### **Attendance Policy**

This Seminar is a skills-building class. Thus, your ability to effectively learn mediation advocacy skills depends on the efforts and commitment of everyone. Because you will be playing roles as attorneys and clients, the learning of the whole class depends on your presence, participation and input. Given the intensive and abbreviated schedule of this class, timely attendance at all class sessions is mandatory to receive a passing grade for the class.

#### **Code of Class Conduct**

In order to create an environment that is conducive to intensive, hand-on learning and skill development, please commit to the following code of conduct:

1. **Commit to the role play.** The course exercises are intended as hands-on learning experiences that simulate real lawyering work. The results of your simulation exercises will not be graded, however, your ability to engage in and reflect on your performance will be evaluated, and this includes staying in character and committing to the exercise. Please do not “break” role or make up facts.
2. **Respect the instructions:** Students will receive General Instructions for the Simulation (known to all parties) and Confidential Instructions (known only to you). Please do not disclose the confidential information you receive to others.
3. **Commit to your own learning and the learning of your classmates.** Engage in meaningful debrief, be self-reflective of your own skill development, be open to feedback, and be prepared to offer constructive critique to your classmates.
4. **Respect different viewpoints.** Conduct yourself professionally and courteously toward your professor and peers during in-class discussions and exercises.
5. **Respect the schedule.** The course is very intensive. Please follow the schedule posted for start time, be on time and return from breaks/lunch on time.
6. **Turn off or silence your electronic devices.**

### **Feedback to the Professor:**

Students will be asked to complete an anonymous mid-course evaluation part way through the weekend to allow feedback to the professor and to identify any topics or concerns they would like to see addressed during the remainder of the course. It is the student’s obligations to raise with the professor any concerns or questions about the class: please do not wait until the mid-course evaluation or the final evaluation. The course is meant to provide a meaningful learning experience in an intensive, yet positive and safe environment, so please let me know if you have any questions or concerns; I am truly committed to your learning. Your comments and questions are always welcome at any time during this seminar. All feedback will be confidential and will be received and responded to promptly and respectfully. There will also be a final evaluation.

### **A Note on Confidentiality and Integrity**

The best way to learn mediation advocacy is to do it. You will be playing parts as attorneys and clients in a multi-party, multi-issue dispute during the course. The simulation relies on confidential instructions; please do not share these with others. Also, because it is difficult to design, test, and refine effective problems for a course such as this, please do not share the role plays with students not taking this Seminar. Your honesty, integrity, and ethical conduct are expected and appreciated in this and all aspects of the Seminar.

## **A Note on Feedback and Critique**

You will be receiving feedback from your peers and from the professor, as well as providing feedback to others. Giving feedback is a privilege with responsibilities, not an entitlement. It is expected that the following “ground rules” will be followed:

- Be self-reflective and self-aware.
- Be open to feedback. It facilitates your learning, particularly of a skill.
- Be positive. Please note strengths first, and then areas for improvement.
- Be sure to critique, not criticize.

## **Final Course Evaluation**

You will be given class time to complete a final course evaluation conducted by the Law School.

## **Reminder on Deliverables**

Self-Reflective Journal (5 pages), Final Memo: Mediation Advocacy Plan (10 pages), and Lessons Learned (1 page): Due Saturday July 21, 2018 at 11:59pm (one minute before midnight) emailed to Professor in one document (Word or pdf).

Once deliverables are submitted, no amendments, revisions or supplements will be accepted.

Absent truly exceptional circumstances submitted in writing to the Professor no later than Wednesday July 18 by 5PM with supporting documentation (doctor notes, etc) and written approval from the Professor, no extensions will be allowed. Late papers will not be accepted and will result in failure of the class. Please pay attention as this will be enforced.

## **CLASS SCHEDULE**

<b>DAY ONE</b>	<b>Advanced Assignments: Text Chapters 1-3 and 11-12; DVD Chapters (Tracks) 1, 2, 16 and 18 , General Instructions for Simulation</b>
<b>12:45 -1:30</b>	Course Objectives, Introductions, Expectations and Role Play
<b>1:30 - 2:30</b>	Mediation Process, Principles and Practice <ul style="list-style-type: none"><li>- Why Negotiations Fail</li><li>- Definition of Mediation, Approaches and Types</li><li>- When to Mediate/When Not to Mediate</li><li>- Role of Mediator/Advocate/Client</li><li>- Initiating Mediation/Court-Ordered Mediation</li></ul>
<b>2:30 – 2:45</b>	Discussion of Video Clips: Chapters 1, 2, 16, 18



<b>2:45 – 3:00</b>	Break
<b>3:00 – 3:30</b>	Simulation: Read and Prepare to Initiate Mediation with Opposing Counsel (In teams, Reading of Confidential Instructions, Plan to Initiate with Counterparts From Other Group-i.e. Clients and Advocates in same assigned roles)
<b>3:30 – 4:00</b>	Simulation: Initiate Mediation with Opposing Counsel (In teams, Hula Advocates and Clients from both groups initiate mediation with Plaintiffs; State Advocates and Clients from both groups initiate mediation with Community)
<b>4:00 – 4:15</b>	Simulation: Debrief of Initiating Mediation
<b>4:15 – 4:45</b>	Selecting a Mediator <ul style="list-style-type: none"> <li>- What Type of Mediator and Why?</li> <li>- Selecting a Mediator</li> </ul>
<b>4:45 – 5:15</b>	Simulation: Prepare to Select a Mediator (In teams, all advocates and clients prepare with other students in same role)
<b>5:15 - 6:00</b>	Simulation: Interview and Select a Mediator (In teams, all advocates and clients in same role work together and participate in call to interview the mediator)
<b>6:00 – 6:30</b>	Set-Up for Day Two
<b>DAY TWO</b>	<b>Advanced Assignments: Text Chapters 4 - 6, 13 -14; DVD Chapters 3- 13</b>
<b>8:30 – 9:15</b>	Designing the Mediation <ul style="list-style-type: none"> <li>- Designing and Structuring the Mediation Process</li> <li>- Drafting and Executing the Mediation Agreement</li> <li>- Law of Mediation and Sources of Confidentiality</li> <li>- Pre-Mediation Contacts, Caucuses, Statements, Submissions</li> <li>- Drafting and Executing the Confidentiality Agreement</li> </ul>
<b>9:15 – 9:45</b>	Simulation: Prepare to Design the Mediation (In teams, all advocates and clients in same role prepare together)
<b>9:45 – 10:15</b>	Simulation: Designing the Mediation with the Mediator (In teams, all advocates and clients in same role work together/participate in call with the mediator)

<b>10:15 – 10:30</b>	Break
<b>10:30 – 11:00</b>	Preparing the Client/Preparing the Case <ul style="list-style-type: none"> <li>- Selecting the Client/Who Should Be at the Table?</li> <li>- Settlement Authority Issues</li> <li>- Preparing the Client/Preparing the Case</li> </ul>
<b>10:45 – 11:00</b>	Early Stages of the Mediation Process: Opening Statements
<b>11:00 – 11:15</b>	Discussion of Video Clips: Chapters 3 - 5
<b>11:15 – 11:45</b>	Ethical Considerations; Opening Statements: Mediator, Client, Advocate
<b>11:45 – 12:30</b>	Simulation: Prepare the Client and the Case, Plan Opening Statements (two Opening Statements per team, preparation up to individual team)
<b>12:30 – 1:00</b>	Lunch
<b>1:00 – 1:45</b>	Simulation: Opening Statements-each group will make opening statements. (Both Advocate and Client has the option to participate in opening statement, in role. Opposite group will be watching for debriefing and feedback purposes)
<b>1:45 – 2:15</b>	Simulation: Debrief Opening Statements (Student will provided guided debrief to one other student in front of class, each student will give one debrief and receive one debrief from another student)
<b>2:15 – 2:45</b>	Early Stages of the Mediation Process and Joint Sessions: Gathering Information and Identifying Interests
	Discussion of Video Clip 6
<b>2:45 – 3:00</b>	Break
<b>3:00 – 3:30</b>	Simulation: Prepare for Joint Session (Advocate and Client in your group only)
<b>3:30 - 4:30</b>	Simulation: Joint Session (Student will spend one-half hour in simulation as either Advocate or Client, the other half hour spent observing and giving feedback on another student and mediator tactics)
<b>4:30 – 4:45</b>	Debrief/Feedback Joint Session (Student will provide guided debrief, plus guided “Mediator tactics” debrief, and get one debrief from another student)

<b>4:45 – 5:30</b>	<p>Middle Stages of the Mediation Process</p> <ul style="list-style-type: none"> <li>- Three Phases of Private Caucuses</li> <li>- Developing and Narrowing Options/Cognitive Biases</li> <li>- Strategic Use of Mediator/Using Down Time</li> <li>- Coaching the Mediator/Seeking Advice from Mediator</li> </ul>
	Discussion of Video Clips 8 and 9
<b>5:30 – 6:00</b>	Discussion of Video Clips 7, 10 – 12. Half of class will redo ineffective caucus in #7, other half will come up with 3 mediator tactics and 3 advocate tactics that were either effective/ineffective and why. Outcomes will be presented to class.
<b>6:00- 6:30</b>	Set up for Day Three
<b>DAY THREE</b>	<b>Text Chapters 7 – 10, DVD Chapters 14 – 15, 17, 19 - 24</b>
<b>8:30 – 9:00</b>	<b>**SWITCH ROLES **</b> Simulation: Prepare to Participate in Private Caucuses/Middle Stages (Client and Advocate in assigned group only)
<b>9:00 – 10:00</b>	Simulation: Middle States of Mediation Process/Private Caucuses (Mediator will meet with parties individually or in groups, parties will spend part of the time acting in simulation, and part of the time observing and giving feedback on another student and Mediator tactics)
<b>10:00 – 10:15</b>	Break
<b>10:15 – 10:45</b>	Simulation: Debrief/Feedback Middle Stages of Mediation (Student will provide guided debrief, as well as guided “Mediator tactics” debrief, and will get one debrief from another student on their simulation performance.)
<b>10:45 – 11:15</b>	<p>Later Stages of the Mediation Process</p> <ul style="list-style-type: none"> <li>- Types of Impasse/Strategies to Break Impasse</li> <li>- Closure Issues, Role of Apology</li> <li>- Piecemeal Settlements</li> <li>- MOUs and Term Sheets: Use and Enforceability</li> <li>- Settlement Documents/Settlement Procedures/Limitations</li> <li>- No Agreement</li> </ul>
<b>11:15 – 11:45</b>	Discussion Of Video Clips 14, 15, 17, 19 - 24
<b>11:45 – 12:00</b>	Pass Out Additional Instructions

<b>12:00 – 12:30</b>	Simulation: Prepare for Later Stages of Mediation, apology preparation re apology to be accepted and apology to be given (Client and Advocate in assigned group only)
<b>12:30 - 1:00</b>	Lunch
<b>1:00 - 2:45</b>	Simulation: Later Stages of Mediation and Closure (Mediator will meet with parties individually or in groups), parties will spend part of the time acting in simulation, and part of the time observing and gathering feedback on another student and Mediator tactics)
<b>2:45 – 3:00</b>	Simulation: Debrief/Feedback Later Stages of Mediation (Student will provide guided debrief, as well as guided “Mediator tactics” debrief, and will get one debrief from another student on their simulation performance.)
<b>3:00 – 3:15</b>	Break
<b>3:15 - 3:30</b>	Simulation: Team Process Debrief (by team, by category in gallery tour)
<b>3:30 – 4:00</b>	Simulation: Team Process Debrief (Together as a class, will debrief the mediation process, including any differences in the direction of mediation and outcomes between the two teams that resulted from strategies or tactics used by any of the advocates and clients)
<b>4:00 – 4:15</b>	Simulation: Class Debrief (Class discussion on the Plus/Delta of the simulation)
<b>4:15 – 4:45</b>	Group Exercise: Lesson Learned about Client and Attorney Mediation Advocacy
<b>4:45 - 5:15</b>	Common Mediation Mistakes
<b>5:15 – 6:00</b>	Professional Development and Next Steps
<b>6:00 – 6:30</b>	Course Evaluations and Wrap-Up
	<b>Self-Reflective Journal (five pages), Final Paper: Mediation Advocacy Plan (ten pages) and Lessons Learned (one page) due Saturday July 21, 2018 by 11:59pm (one minute before midnight) sent to Professor by email (cacjd@comcast.net) in one Word or PDF document. Thank you!!</b>