

## Syllabus – Mediation Advocacy

Cumberland School of Law  
Law 803, Spring 2009

Wednesday  
8:00 a.m. – 9:50 a.m.  
Room 101

Adjunct Professor: V. Michelle Obradovic, Esq.  
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Exam - May 1st 9-12

Room 540 – Jefferson County Courthouse

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### **Grading:**

[www.mediationadvocacy.com](http://www.mediationadvocacy.com)

\*Attendance is required.

1/3 Attendance, Preparation and Class Participation

1/3 Mock Mediation Position Statement and Performance in Mock Mediation

1/3 Mediation Observation and Analysis Paper

- Students earn points by attending classes and demonstrating thorough preparation. Interactions with guest lecturers, participating meaningfully in class discussions and group exercises and thoughtful reflective essays counts for 1/3 of the final grade.
  - Students will be given fact scenarios, group assignments and role assignments for a mock mediation exercise that counts for 1/3 of the final grade. Students should appear in professional dress for the two mock mediation sessions. Prior to the mediation, each Plaintiff team and each Defense team will prepare a position statement. Mediators will be responsible for coordinating the logistics of the sessions and for conducting pre-mediation planning meetings and for journalizing the progress made between sessions. After the mediation is concluded; the group will compile a notebook. This notebook represents the work product of all students for the entire mediation exercise.
  - Students must complete a mediation observation and submit an observation and analysis of same. The analysis must be prepared according to the attached format and include citations to the textbooks. Students should appear in professional dress, and plan to stay for the entire mediation. Students may observe a court mediator or alternatively make their own arrangements to observe a mediator in private practice. Only **two** students may observe a particular mediation. The observation and analysis counts for 1/3 of the final grade.
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### **Texts:**

Mediation Representation: Advocating in a Problem-Solving Process

by H. I. Abramson

Getting to YES

by R. Fisher and W. Ury

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### **Purpose:**

Conflict resolution skills have become a vital part of the practice of law; whether a trial lawyer, a transactional attorney, an in-house counsel or a government attorney, knowledge of how to productively manage conflict is essential. This course examines a variety of approaches to conflict resolution, ranging from problem-solving to adversarial.

Students will learn the methods of traditional analysis of a case from the perspectives of rights, obligations and precedent, and will also learn to look beyond those criteria to a search for solutions that can benefit both sides. Students will learn how to develop a collaborative

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relationship with others and will learn to use the mediator as a tool to overcome impediments and to counter unproductive adversarial tactics.

### Topics / Assignments

Week 1 01/7/09	Course Introduction / Communication Basics / Negotiation Basics
Week 2 01/14/09	Introduction to the Mediation Process
Week 3 01/21/09	In Class Exercise on Mutuality Debrief Exercise
Week 4 01/28/09	<b>DUE:</b> <u>Mediation Representation</u> : Introduction and Chapters 1 through 2
Week 5 02/4/09	Counseling Your Client About Mediation Negotiating an Agreement to Mediate Preparing Your Case for Mediation <b>DUE:</b> <u>Mediation Representation</u> : Chapter 3 through 5
Week 6 02/11/09	<b><u>Guest Lecturers:</u></b> Plaintiff's Counsel - Hare, Wynn, Newell and Newton Defense Counsel - Lightfoot, Franklin & White
Week 7 02/18/09	Preparing Your Client for Mediation Appearing in Pre-Mediation Conferences, Mediation Sessions, and Post Sessions <b>DUE:</b> <u>Mediation Representation</u> : Chapter 6 through 7
Week 8 02/25/09	Breaking Impasses <b>DUE:</b> <u>Mediation Representation</u> : – Chapter 8
Week 9 03/04/09	Interest Based Bargaining (part 1) <b>DUE:</b> Introduction through Chapter 5 of <u>Getting to YES</u> (pages xvii – 94). * Begin preparation for Mock Mediations.
Week 10 03/11/09	Interest Based Bargaining (part 2) <b>DUE:</b> Chapters 6 through 8 of <u>Getting to YES</u> (pages 95 through 144) plus Sections IV and V (pages 145-200). * Continue preparations for Mock Mediations.
Week 11 03/25/09	Mock Mediations – Opening statements / Engage in Caucuses
Week 12 04/01/09	Mock Mediations - Complete Caucuses and Close the Mediation
Week 13 04/08/09	Debrief Mock Mediations
Week 14 4/15/09	Ethical Issues / Bringing It All Together

Samford University complies with Section 504 of the Rehabilitation Act and the Americans with Disabilities Act. Students with disabilities who seek accommodations must make their request through Anne Sherman in Disability Support Services. This office is located in Counseling Services on the lower level of Pittman Hall, or can be reached at 726-4078 or 726-2105. A faculty member will grant reasonable accommodations only upon notification from the DSS.

### Suggested Considerations for Position Statements

1. A recitation of the facts that gave rise to the litigation.
2. The present posture of the case (any matters pending in court or in any related litigation).
3. Any recent developments that may impact on the resolution of the case.
4. The history of any efforts to settle the case including any prior offers or demands.
5. A summary of the parties' legal positions and a candid assessment of their respective strengths and weaknesses.
6. Identification of parties, representatives and counsel who will be directly involved in the mediation discussions; and a confirmation of their authority to settle the case.
7. Description of any sensitive issues that may influence any settlement negotiations
8. The nature and extent of any prior or future relationship between the parties that may affect the mediation.
9. The negotiating strategy of the parties and counsel.
10. Any suggested approach you would like me, as your mediator, to take in an attempt to settle the case.
11. Any creative solutions.

**NOTE:** To the extent possible, position statement should be shared with your opposition (the more your opposition understands about your position, the better able your opposition will be able to negotiate with you). You may make your statement confidential in whole or in part with those confidential portions presented in a p.s. not copied to opposing counsel.

**Pre-Mediation Planning Letter**

Date of the Letter

MEDIATION COMMUNICATION—STRICTLY CONFIDENTIAL

**VIA HAND DELIVERY and E-MAIL**

Plaintiff's Counsel  
 Mail Box #  
 e-mail address

Defense Counsel  
 Mail Box #  
 e-mail address

Re: Style of the Case

Dear Attorneys:

This will confirm my conversation with each of you on \_\_\_ day \_\_\_, \_\_\_ date \_\_\_, 2007 relative to the parameters for our \_\_\_ date of mediation session 1 \_\_\_ and \_\_\_ date of mediation session 2 \_\_\_ mediation sessions in the above-styled case. At that time, the following was agreed:

The mediation shall begin at \_\_\_ start time \_\_\_.

The mediation will take place at \_\_\_ location \_\_\_.

Position statements shall be provided to me and \_\_\_ will or will not be \_\_\_ exchanged on or before \_\_\_ date \_\_\_.

Plaintiff's and Plaintiff's Counsel's opening statement shall not exceed \_\_\_ time \_\_\_.

Defendant's and Defense Counsel's opening statements shall be not exceed \_\_\_ time \_\_\_.

It is my understanding that we begin the negotiations with the Plaintiff at \$ \_\_\_\_\_ and the Defendant at \$ \_\_\_\_\_.

I have suggested that each side be prepared to negotiate to their respective goals in three to five moves. (I have advocated that these negotiations not be based on traditional 'bottom line' relationship bargaining, but rather be based upon reasonable moves in relation to your respective goals for settling the case. These goals, having been based upon your evaluation of a reasonable settlement range, were in turn based on a reasonable verdict/judgment analysis. Each move in relationship to your goal should also have some clear basis. At the point in the mediation where both sides have identified respect goals, I would then ask each of you for the opportunity of exploring common ground, should your goals be different.

I am committed to being in touch with each of you over the next several weeks to assist you as you prepare for the mediation sessions, and should anyone have questions, please do not hesitate to contact me. Otherwise, I look forward to the opportunity of working with each of you toward the final resolution of this case.

Sincerely,

## Mediation Observation Report Requirements

- Citations to Mediation Representation and Getting to Yes as applicable are required for each section listed below as well as a thorough analysis of the strategy or technique.
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1. Style of the case, venue, judge, attorneys and parties.
2. Evaluate Position Statements (a) Did it assist the mediator? (b) Did it assist opponent in preparing for mediation? (c) Did it assist the process?
3. Opening Statement (a) Evaluate the attorneys regarding the substance of the presentation. (b) What was the effect on the other side? (c) Did it aid in resolution? (d) How did it interfere or become an obstacle in mediation?
4. Opening Offers (a) How realistic were each side's respective opening offers in light of their ultimate goals? (b) How did opening offers and or ultimate goals become an obstacle to resolution?
5. Negotiations (a) Did the parties negotiate based upon the other sides position, i.e. relationship moves? (b) Did the parties negotiate based upon their own evaluation of a reasonable settlement range? (c) Both / Neither? Explain.
6. Home plate – Did the parties get to the ballpark? How? Did they achieve resolution? By what method? i.e. private caucuses, mediator's proposal, meetings between attorneys.
7. Conclusion (a) Was the mediation concluded with a mediation agreement? What were the components of the agreement and the reasoning behind each. (b) If mediation did not resolve the case, how was the session concluded? To what extent did mediation make it possible for the parties to have further negotiations at a later date? Explain. (c) Did mediation become an obstacle to future discussions. (d) What aspects of the case require judicial resolution?
8. Compare and contrast the attorneys' performances, the parties' participation and influence on the process and describe the mediator's approach to the overall process and in each room.

2009  
Jefferson County, Alabama

# COURT MEDIATION PROJECT

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## **I. Overview of the Project**

Founded in September of 1999 and begun in August 2000, the Jefferson County Court Mediation Project provides mediation services to parties on the Small Claims Docket and for specially selected Circuit and District Court cases. Most mediation sessions are conducted the day of trial in private areas of the Jefferson County Courthouse. Conference rooms, courtrooms and jury rooms are used on a first come - first served basis.

Attorneys who have been trained in basic mediation processes conduct mediation sessions. Currently, approved trainings consist of a minimum of 20hrs. of instruction over a 3-day program. A list of approved training programs is available at [www.AlaBar.org](http://www.AlaBar.org) under ADR. Troy Smith, Esq. has been working with the Alabama State Bar and the Alabama Supreme Court for over a decade to provide training that meets all the necessary criteria. He can be reached at (800) ADR-FIRM or at [troy.smith@mediationmedia.com](mailto:troy.smith@mediationmedia.com) and the website is <http://www.mediationmedia.com>.

Typically, lead mediators are recruited from the rolls of the Academy of Attorney Mediators and from the roster of experienced attorney mediators compiled by the Alabama State Bar Center for Dispute Resolution in Montgomery, Alabama. Additionally, an individual who has completed an approved training course, but is not yet on the roster may participate in the program through first observing and then assisting in three (3) mediation sessions. Non-attorneys interested in learning about mediation are welcome to observe, but may not conduct mediation sessions. Mediators volunteer their time and serve according to the needs of each Judge's docket.

Mediation services are offered at no charge to the litigants. The parties' participation in the Program is voluntary. Parties are encouraged to settle their dispute, but never ordered to do so. The parties do not lose their right to trial if they attempt but are unable to reach agreement. No penalties are imposed by the Judge on any party for refusing to mediate or to settle. All matters disclosed in the mediation session are confidential.

## **II. The Ways a Case Can Get to Mediation:**

### **(A) Request for Participants at the Docket Call:**

Since most mediation sessions are arranged the day of trial, mediators are available at the Docket call. Prior to the Judge calling the docket and setting the order of cases for trial, a mediator will announce the availability of mediation services and briefly explain the benefits of participation in the program.

Historically, at least two or three parties will acknowledge a willingness to mediate while they await their trial. If the parties are unable to reach agreement, then they will go forward with trial at their scheduled time. It is also possible for the Judge to refer a pending case to mediation. Additionally, the parties may specifically request mediation in advance.

## **III. Covering a Docket**

The *pro se* dockets for Judges Lowther, Bynon and Winston are always on Friday. Mediators are asked to arrive at 8:30 a.m. During the first four years of the Project, the Judges rotated according to a 'home court' schedule. However, as of March 2004, mediators have been available in all three courts each week. Upon arrival, the mediator should ask to review the files for the cases on the docket, ask for a copy of the docket, and ask for the packet of mediation forms which is kept by each Judge's staff. The packet contains copies of all forms a mediator may need during the course of the mediation, as well as informational materials to be passed out to the parties while waiting for the first call of the docket. When the Judge calls his docket, the mediator should indicate on the docket sheet which parties were present and whether the case was tried, mediated, dismissed or a default judgment entered. This marked up docket sheet should be left in the forms packet when it is returned to the Judge's staff.

## **IV. Forms and Record Keeping**

The following forms are used during the mediation and for record keeping:

(A) Agreement to Participate in Mediation (Attachment A to this handout). This document is signed by all the parties at the commencement of the mediation.

The Agreement to Participate in Mediation Form: (1) Spells out the ground rules for the session; (2) Sets out the voluntary nature of the process; (3) States that any

settlement is the result of an agreement between the parties; (4) States that mediation, if successful, will result in a binding agreement; (5) States that settlement negotiations are confidential, and (6) States that the mediator cannot be subpoenaed to testify.

(B) Mediated Settlement Agreement - (Attachment B to this handout). This document sets forth the terms of the agreement between the parties, states the administrative disposition of the case, and clarifies the consequences of noncompliance by either of the parties.

In most situations, the **parties agree to a set of monetary terms**. The case is then disposed of in one of two ways: 1) Dismissed. 2) Placed on the Settled / Paying docket. However, in some cases, the **parties agree upon specific performance**. In this circumstance, the specific performance must be detailed and have a definite performance drop-dead date (usually no more than a calendar year in the future unless the Court approves a longer period of payment). Additionally, the parties must also agree on a monetary judgment to be taken on a precise date where specific performance is not carried out as promised and who is to bear the Court costs. The case is then placed on the Settled / Paying docket.

- *Each of agreements must: a) state the obligation, b) whether successful completion of the obligations serves as full and final settlement, and c) if the exchange of money is an issue of the mediation, the agreement should specify the time, manner, method of payment and delivery system. If the resolution is one of specific performance, then the agreement must include a dollar amount for the consent judgment in the event specific performance does not occur. d) specific instructions as to which party bears court costs and an indication of whether court costs have been included in the dollar value established.*

(C) Mediator's Report - This document (Attachment C to this packet) is used by the mediator to record the disposition of the case and to provide comments about the session.

## V. Post-Mediation Administration

The Project Director maintains the current and archived official records of the Mediation Project. The record includes mediation documents such as the Mediator's Report, Agreements to Mediate and the marked up docket sheet. The record is maintained by the date of the mediation.

Upon request, the Project Director will maintain records of a particular mediator's *pro bono* time and the number of mediations conducted and will forward appropriate documentation to the Alabama Center for Dispute Resolution.

After mediation, the case files are reviewed by the Judge and disposed of in the following manner:

- (A). Unsuccessful Sessions - the Mediator's Report and the marked-up docket sheet are given to the Judge's staff for pick up by the Project Director. These documents will be filed in the official Project records.
- (B). Successful Sessions – three copies of the completed Mediation Settlement Agreement are made. The original is placed inside the case folder, each party is given a copy, and a copy is mailed to the Project Director or left with the Judge's staff. The District or Circuit Judge will make an appropriate disposition notation on the case action summary.

**Agreement to Participate in Mediation**

We have had mediation explained to us. We understand that mediation is a voluntary process. We understand the mediation is not a court proceeding and that the formal rules of court and evidence will not apply.

We understand that the mediator cannot and will not attempt to impose on us any settlement agreement that we do not find acceptable.

We understand that at any time before an agreement is reached, any of us may withdraw from mediation. Only we can reach a resolution, and we agree to abide by the agreement we make during mediation.

We understand that all communications involved in the mediation process shall be strictly confidential.

We agree not to subpoena or otherwise involve the mediator in any future legal action related to this case.

We understand mediation and consent to participate in the process. If we do not reach an agreement we will return to Court to resume legal proceedings.

Case #: \_\_\_\_\_ Date: \_\_\_\_\_

Plaintiff(s): \_\_\_\_\_

\_\_\_\_\_

Defendant(s): \_\_\_\_\_

\_\_\_\_\_

Mediator / Witness: \_\_\_\_\_





**Mediator's Report**

Mediator's Name: \_\_\_\_\_ Date: \_\_\_\_\_

Total Mediation Time: \_\_\_\_\_

Case Style: \_\_\_\_\_

Docket Number: \_\_\_\_\_ Docket: Small Claims / Civil

Type of Claim: \_\_\_\_\_

Original Claim Amount: \_\_\_\_\_ Original Counterclaim Amount: \_\_\_\_\_

Disposition:

- \_\_\_\_\_ Settled
- \_\_\_\_\_ No settlement, returned to court for trial.
- \_\_\_\_\_ Partial Settlement
- \_\_\_\_\_ Mediator unable to mediate parties because: (do not include confidential information) \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
- \_\_\_\_\_ Other \_\_\_\_\_  
 \_\_\_\_\_

Mediator's Comments: (do not included confidential information) \_\_\_\_\_

\_\_\_\_\_  
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 \_\_\_\_\_