REQUIRED COURSE MATERIALS:


Roger Fisher, William Ury, and Bruce Patton, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Second Edition 1991) (12 copies on reserve in library)


Supplemental Reading Material and Class Handouts will be provided during class or made available on-line.

COURSE OBJECTIVES:

This course introduces students to the theory and practice of negotiation, mediation, and arbitration. The ability to participate successfully in any aspect of Alternative Dispute Resolution (ADR) rests on a combination of analytical and interpersonal skills.

Analysis is important. ADR participants cannot develop promising negotiation strategies without acquiring a deep understanding of: the context of the situation; their own interests and those of the other parties; any opportunities and barriers to creating and claiming value on a sustainable basis; and the range of possible moves and countermoves both at, and away from, the bargaining table, which will allow achievement of the negotiation’s objectives.

Interpersonal skills also are important because ADR involves communication, relationship and trust building, and mutual persuasion.

This course will provide you with a set of conceptual frameworks that will help you become better at analysis and strategy. Through participation in negotiation, mediation, and arbitration role-play simulations, you will have the opportunity to exercise powers of communication and persuasion, and to experiment with a variety of tactics and strategies.
Through analysis of case studies and discussion of articles on dispute resolution analysis, you will apply the lessons learned to ongoing, real-world dispute resolution.

From repeated exposure to simulations that involve a shifting mix of cooperation and competition, as well as important ethical choices, your understanding of negotiation, mediation, and arbitration (as well as your conflict resolution skills) will develop and improve.

**CLASS CONTENT AND ORGANIZATION:**

**Overview**

The course begins with a focus on disputes, their causes, and avenues for resolving disputes. The course builds cumulatively from simple negotiations to those of greater complexity – that is, starting with two-party, single-issue, one-shot cases and building toward multi-party, multi-issue negotiations that evolve over time. The course then progresses through mediation and arbitration. Structured exercises are used to isolate and emphasize specific analytic points and essential skills. Cases and readings serve to integrate the analytic points, as well as to develop intuition about more complex, real-world dispute resolution.

**The Power of Context and Other Cross-Cutting Issues: Culture, Gender, Personal Style and Persuasion Techniques**

Throughout the course, we will discuss the role of context in dispute resolution and how it affects analysis and practice. For example, it may make a real difference whether a dispute involves public or private players, repeat players or one-time participants; whether it is in the sphere of labor-management relations, family disputes, or community conflicts; whether the context is seen as a “deal” or a “dispute;” or whether it involves different cultural or personal styles.

Many practitioners and analysts would argue that differences in culture, gender, race, etc., and personal styles have a pervasive and profound effect on bargaining dynamics and outcomes. You, of course, may agree or disagree with them. In all our discussions of the cases, exercises and readings, we will simultaneously address the analytical and social-psychological behavioral components of interdependent decision-making. In other words, you will be expected to ask yourself:

* How is the context of this dispute affecting the parties?
* Are there gender or cultural issues impacting the substance or process of the attempted conflict resolution?
* What strategies would benefit the situation?
Negotiation, Mediation and Arbitration Exercises

At several points in the course (roughly once a week) you will be assigned a role, paired with one or more counterparts, given instructions (often including confidential information), and asked to prepare and carry out an exercise before or during class. These exercises are an essential vehicle for learning in the class. Therefore, one major requirement of the class is that you conscientiously prepare for, carry out, and be ready to share insights gained from the exercises with the class.

In our class discussions, I am primarily interested in your faithful and creative participation, in the quality and originality of your discussion of particular strategies, and in your reflections on how you might have done better. Failure to prepare and carry out these exercises will adversely affect your class participation and will harm your assigned role play partners, whose learning experience depends on your being available and prepared. The quality of our discussions, therefore, depends on thorough preparation of both role play material and discussion questions before the class.

The Importance of Following Instructions

Many of the exercises include confidential instructions. Please do not show these confidential instructions to others. You may choose to discuss or reveal some of their content – indeed, communicating your interests clearly is essential to effective negotiation, but you must not physically show others your actual confidential instruction sheets. This rule largely mirrors reality since, in most disputes, revealing underlying values and information to your negotiating counterparts is approached cautiously and strategically.

The instructions for the exercises are designed to be self-explanatory. Please follow the instructions carefully. For example, your role play instructions might ask you to take an initial position and then change your position or give additional information at a later stage of the process. The evolution of the process is very important. If the instructions fix the set of issues or interests to be negotiated, do not invent new ones as part of a reported agreement; this will distract from the intended focus of the exercise. It will undermine meaningful learning AND evaluation if you reveal information before you have been instructed to do so.

For those exercises that have fixed quantitative (number) goals, you should take the numbers as representative of your true interests and try to do as well as you can, subject to whatever considerations of responsibility and ethics you expect would shape your behavior in the dispute. For those exercises with more complex, less quantitative goals or mixed interests, you should think hard about what interests you would care about, and what trade-offs you would be willing to make, in the specified situation.

You may sometimes feel uncomfortable trying to out-guess or outwit other class members, but overwhelmingly, former students have found the experience rewarding – a low-cost chance to try different negotiating approaches. To the extent that your wits and
emotions are engaged in the exercises, they will help you become more aware and effective negotiators/mediators. As with a tennis match among friends, it does more for your game – and is more fun – to play vigorously and intelligently while on the court.

Some general rules for role players include the following:

1. Stay in the role. Each role is important and is intended to be a learning experience for the role player, the other participants and observers.

2. Familiarity breeds comfort! It is easy to become complacent. Try not to do it. Losing interest in the process hurts everyone.

3. If the role is hard to identify with or is unclear to you, ask for assistance.

4. It is okay to be original and add to the four corners of the document – just do not change the fundamental intent. Remember only you can make it real. Creativity counts!

5. At times, we may conduct the role play in a “theater” style with one set of participants in the front of the room and the rest of the class observing. Observers should be prepared to comment, raise questions, and assume the role of the role play they were assigned.

Written Assignments

Preparation and reflection are two of the most important aspects of successful dispute resolution. However, these skills are often neglected. In order to develop your skills in these areas, and to assess your progress, you will be assigned various written projects throughout the semester. Some of these assignments will be planning sessions for or “post-mortems” of simulations. Others, discussed later, will be graded assignments.

CLASS PARTICIPATION AND ATTENDANCE:

Because in-class time is limited, it is essential to prepare and read through the material prior to class. Feel free to call or e-mail me if you need clarification on the material or exercises. Your final grade can be improved through consistent, intelligent contributions to class discussions and simulations. Your grade can be negatively affected by failure to do so. (See grading section below.) To prepare for class discussion, you should read all of the assignments and be prepared to:

a) ask questions in order to explore an aspect or topic of the readings in more depth;

b) provide your critique of and ask questions regarding something you found contradictory or confusing in the readings; and/or

c) share a personal experience that is relevant to the topics covered in the readings (relevant life experiences provide enlightening and engaging examples for discussion).
Ideally, you will attend all 14 classes. However, in view of personal commitments and emergencies that inevitably arise, you may miss a maximum of two class sessions, with no questions asked. However, the written assignments for those classes will still be due. Students exceeding two absences, regardless of the reasons, may be required to withdraw from the course. In cases of serious and prolonged illness, we reserve the right to substitute a series of written assignments for the attendance requirement covering the material discussed in a student’s absence. Students who are not prepared in class will be counted as absent. Leaving class early or coming to class late will be counted as a partial absence and may negatively affect your class participation grade.

Your class participation, such as how well you contribute to the class discussions and how you prepare and participate in role-playing simulations, will have a significant effect on your grade for the class. The goal is to learn from one another. For this to happen, each of you must speak up in class, on a frequent basis. Your comments should be based on the readings and based on your own experience. You should expect ask questions of your professor and your fellow students. Often a good question is just as valuable as a good comment. You must be physically present to participate, so unexcused lateness or absences will be factored into your participation grade.

In an emergency, students may attend another section of ADR Theory & Practice.

Professor Larkin’s class meets on Wednesday from 1:00 p.m. to 4:00 p.m. in Room 305. Her e-mail address is larkin@wulaw.wustl.edu.

Professor Reeves’ class meets on Wednesday from 1:00 p.m. to 4:00 p.m. in Room 306. His e-mail address is jreeves@cmsystems.us.

Professor Litz’s class meets on Mondays from 6:00 p.m. to 9:00 p.m. in Room 305. His e-mail address is rlitz@carterbauersoule.com.

You should contact the professor by e-mail to request permission to attend her/his class, and to receive any instruction from her/him. You should contact me by e-mail to let me know that which class you will be attending. My e-mail address is kwhitby@spencerfane.com.

**LAP-TOP SURFING**

As this class requires a great deal of in-class participation and interaction, surfing the net or answering email in class, although a great temptation for us all, will reflect very poorly on your class participation.

**GRADING:**

Your final grade will be a combination of the following elements.
a. Your weekly class participation throughout the semester, as demonstrated through preparation and discussion of the materials and written assignments and your active engagement in the role-play simulations, will be worth approximately 15% of your grade.

b. Three papers assigned throughout the semester which will gauge your understanding of the readings, role plays and class discussion.

The paper will focus on Negotiation (5 pages plus 2) and will be worth 20% of your grade. The second will focus on Mediation and Mediation Advocacy (7 to 8 pages) and will be worth 25% of your grade. The last paper (10 to 12 pages) will include Arbitration but will require mastery of material from the entire class, and will be worth 40% of your grade.

OTHER BOOKS YOU MAY FIND USEFUL:


Roger Fisher and Danny Ertel, GETTING READY TO NEGOTIATE: A STEP-BY-STEP GUIDE TO PREPARING FOR ANY NEGOTIATION (1995)


J. Kottler, BEYOND BLAME: A NEW WAY OF RESOLVING CONFLICTS IN RELATIONSHIPS (1944)


R. Mnookin, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000)


Leonard L. Riskin and James E. Westbrook, DISPUTE RESOLUTION AND LAWYERS (complete or abridged 2d ed. 1998)

Nancy H. Rogers & Craig A. McEwen, MEDIATION: LAW, POLICY AND PRACTICE (2d ed. 1998)

Douglas Stone, Bruce Patton & Sheila Heen, DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1999).


**ADR WEB SITES YOU MAY FIND HELPFUL:**

http://www.acresolution.org/ (Association for Conflict Resolution)

http://www.abanet.org/dispute/home.html (ABA Dispute Resolution Section)

http://www adr.org (American Arbitration Association)

http://www.afccnet.org (Association of Family and Conciliation Courts)

http://www.arb-forum.com (National Arbitration Forum)

http://www.apeacemaker.net (National Conference on Peacemaking and Conflict Resolution)

http://www.beyondintractability.org (Beyond Intractability, peace and conflict info)

http://www.cpradr.org/ (Center for Public Resources)

http://www.colorado.edu/conflict/ (collecting ADR resources)

http://www.iccwbo.org (Conflict Resolution Center International)

http://www.iccwbo.org (International Chamber of Commerce)

http://www.jamsadr.com (a dispute resolution organization)

http://www.mediate.com (gathering spot for mediators)
http://www.nasd.com (National Association of Securities Dealers)

http://www.usam-midwest.com (U.S. Arbitration & Mediation Midwest)
CLASSES 1 and 2: LEGAL DISPUTE RESOLUTION OVERVIEW

Class 1 - Week of August 21

The Landscape of ADR

Objective: To provide you with an overview of legal dispute resolution processes – from negotiation to litigation, and everything in between - and an appreciation of how it occurs locally, nationally and internationally.

Readings: Read RESOLVING DISPUTES, pp. 1-16 (overview); pp. 609-617 (processes); GETTING TO YES - read in its entirety by Class 2.

In-Class Handouts: Spectrum of Conflict Resolution, Key Elements of ADR Processes.

Assignment: In-class role play – The Senate Table. No homework preparation.

Class 2 - Week of August 28

Dispute Resolution Theory

Objective: To provide you with terminology and a theoretical construct to explore and discuss disputes and dispute resolution.

Readings: Finish reading GETTING TO YES.

In-Class Handouts: The Iceberg of Conflict; Circle of Conflict; and Conflict Cube

Assignment: In class exercises - GETTING TO YES. No homework preparation.
**Classes 3-6: NEGOTIATION**

**Class 3 – No classes Monday September 4. Make-up class meets on Friday, September 8 from 2:00 p.m. to 5:00 p.m. Check e-mail and chalkboard for room assignment.**

*Negotiation – The Big Picture and Negotiation Styles*

**Objective:** To provide you with an overview of negotiation styles and strategies and to give you tools to analyze yourself and others in interpersonal disputes.

**Readings:** RESOLVING DISPUTES, pp. 19-77; BARGAINING FOR ADVANTAGE, pp. 3-38.

*Video: “A Civil Action”*

**Class 4 - Week of September 11**

*Developing Negotiation Strategies and Skills*

**Objective:** To develop your repertoire of negotiation strategies and client representation in negotiation. To practice representing a client in a simple negotiation, including drafting a negotiation preparation memo.

**Readings:** RESOLVING DISPUTES, pp. 79-116; BARGAINING FOR ADVANTAGE, pp 39-114.

**Assignment:** Prepare for your role in the negotiation of the “Angry Neighbor” case. Draft a negotiation preparation memo for your supervising attorney (Professor Whitby) outlining your strategy and goals, and bring to class.

**Class 5 - Week of September 18**

*Refining Your Negotiation Strategies and Skills*

**Objective:** To expand and refine your negotiation skills, particularly strategies for getting beyond impasse (including apology). To consider race, gender, ethnicity and power issues in negotiation. To complete a negotiation and draft a settlement agreement.

**Reading:** RESOLVING DISPUTES, pp. 116-163 (closure/impasse); BARGAINING FOR ADVANTAGE, pp. 117-200; handouts, Kress; Missouri Lawyer’s Weekly article, “Study: Saying ‘Sorry’ Helps Defense Get Good Settlement; and Reeves and Tokarz,
The St. Louis Bar Journal, “Resolving Workplace Conflict through Employment Dispute Resolution Programs.”

Assignment: Prepare for your role in the “Non-selection Employment” case by drafting a negotiation memo to assist you in your preparation. Negotiation will be conducted in class as a relay/fishbowl.

Class 6 - Week of September 25

Developing Your Complex Negotiation Skills and Exploring Ethical Issues

Objective: To refine and expand your skills and strategies for dealing with complex negotiations involving multi-party disputes. To develop awareness of ethical issues in negotiation. To refine your skills and to explore ethical and practical issues in multi-party negotiations and final phase negotiations. To practice drafting multi-party agreements within the context of federal litigation.

Readings: RESOLVING DISPUTES, pp. 165-207 (ethical negotiator); pp. 207-219 (fraud, duress, malpractice); BARGAINING FOR ADVANTAGE, pp. 201-234 (ethics).

Assignment: For your own use, prepare a negotiation memo to assist you in your in-class negotiation of the Boxer dispute. Do any legal or factual research you think would be helpful in your negotiation.

FIRST GRADED WRITTEN ASSIGNMENT (20% of the course, graded anonymously).

For the Boxer case, draft a negotiation preparation memo addressed to your supervising attorney (Professor Whitby) and a proposed settlement agreement. You should assume that your supervising attorney has asked you to educate her on negotiation theory and practice pertinent to the facts of your case and strategies you might use to resolve the dispute. Your memo should be a maximum of 5 pages and your proposed settlement agreement should be a maximum of 2 pages (each typed, double-spaced, with 1 inch margins and 12 point type using Arial, Courier or Times New Roman fonts). Your memo is due at the beginning of NEXT WEEK’S class (October 2). DO NOT PUT YOUR NAME ON YOUR MEMO AND SETTLEMENT AGREEMENT – USE YOUR EXAM NUMBER (which will be provided by the Registrar’s Office before the paper is due).
CLASSES 7 – 11  MEDIATION PROCESS and ADVOCACY

Class 7 - Week of October 2

Learning the Basic Process of Mediation

Objective: To become familiar with the various forms of mediation. To learn how to set up a mediation, including drafting agreements to mediate and to observe a mediation from opening to agreement and closing. In Class Video – Len Riskin - “Red Devil Dog” – commercial mediation.

Readings: RESOLVING DISPUTES, pp. 223-237 (basic process); handouts, Agreements to Mediate forms (civil dispute); Mediation Stages and Opening Checklist.

Assignment: None.

Class 8 - Week of October 9

Understanding Mediation Styles and Skills

Objective: To become familiar with the different styles and skills of mediation. To become skilled at helping parties identify their interests, generate options and reach agreement. To practice your mediation skills in a family mediation context.


Assignment: Prepare for your role in the “Changing Schools” role-play simulation. Mediators should practice your mediator’s opening statements using the Mediator’s Checklist for Opening. Parties should prepare a mediation planning memo to assist you in your role, and practice your opening statements.

Class 9 - Week of October 16

Understanding the Mediator’s Role

Objective: To examine and understand the mediator’s skills. To gain experience in a restorative justice (juvenile/criminal) mediation.

In-Class handouts: Juvenile Victim Offender Agreement to Mediate, List of Emotion Words, Reframing, Conflict Script.

Assignment: Prepare for your role in the “Joy Riding” mediation. Mediators should practice your mediator’s opening statements using the Mediator’s Checklist for Opening. Parties should prepare a mediation planning memo to assist you in your role, and practice your opening statements.

FALL BREAK

Thursday, October 19, 2006 – Friday, October 20, 2006

Class 10 - Week of October 23

Developing Advocacy Skills in Mediation and Exploring Ethical Causes

Objective: To prepare a client and represent them in a commercial mediation. To review ethical issues for an attorney advocate in mediation. In class video “Breach of Warranty.”

Readings: RESOLVING DISPUTES, pp. 303-354; handouts, Sample Mediation Engagement Letter (Frankel, Tokarz); and Michael Geigerman, “Preparing a Case for Mediation: The Mediation Checkbook for Attorneys.”

Assignment: Prepare for your role in the mediation by outlining a mediator’s brief on your client’s behalf for your use in class.

Class 11 - Week of October 30

Dealing with Special Problems in Mediation

Objective: To be aware of issues surrounding the mediator’s standards of conduct and mediation as the practice of law. To develop skills in working with special problems in mediation such as good faith, third parties, experts, competency of parties, caucusing, shuttle diplomacy and emotional, unethical or threatening behavior. To practice these skills in an attorney-client complaint resolution mediation.

Readings: RESOLVING DISPUTES, pp. 643 – 648 (med/arb); handouts, Model Standards of Conduct for Mediators, Adopted by ABA House of Delegates, ACR and AAA (2005); Missouri Statutes and Rules; and Missouri Bar Complaint Resolution Program Guidelines.
**Assignment:** Prepare for your role in the “Attorney-Client Traffic Ticket” mediation. Mediators should practice your mediator’s opening statements using the Mediator’s Checklist for Opening and should review the Missouri Bar Complaint Resolution Program in order to explain the process during your opening. Parties should prepare a mediation memo to assist them in their role, and should practice their opening statements. Mediation will be conducted in relay/fishbowl.

**SECOND GRADED WRITTEN ASSIGNMENT (25% of the course, graded anonymously using exam numbers, NOT names):**

This assignment will be on mediation, will be handed out at the end of class, and will be due via e-mail to Professor Whitby’s administrative assistant Carmen Mendoza (cmendoza@spencerfane.com) by 5:00 p.m. on WEDNESDAY, NOVEMBER 8.

**CLASSES 12 & 13 – LEARNING ABOUT ARBITRATION AND ARBITRATION ADVOCACY**

**Class 12 - Week of November 6**  [Will meet jointly with Professor Litz’s class and taught by Professor Litz – location to be determined]

*Learning the Basics of Arbitration*

**Objective:** To become familiar with the arbitration process, arbitration clauses, the powers of an arbitrator and the responsibilities of arbitrating parties.

**Readings:** RESOLVING DISPUTES, pp. 453-509.

**Handouts:** Fed. Arb. Act, 9 US Code, Sections 1-16; Commercial Finance Agreement to Arbitrate; Mediation and Arbitration Short Forms, Short-Form Arbitration, ADR- Arbitration Overview.

**Assignment:** Draft three questions and/or comments regarding arbitration from the readings. Due to Professor Litz at the beginning of class.

**Class 13 - Week of November 13**

*Developing Advocacy Skills in Arbitration; Judicial Review and Fairness Issues*

**Objective:** To understand the role of attorneys in the arbitration process and how to prepare and represent a client in an arbitration. Review of significant case law. Discussion of fairness issues.
Readings: RESOLVING DISPUTES, pp. 517-605.

Assignment: For the in-class arbitration, you will be assigned a task: party, witness, opening statement, direct examination, cross-examination or closing. Prepare for your assigned role.

Class 14: The Future of ADR - Week of November 20

On-line and International Dispute Resolution

Objective: To become familiar with international dispute resolution and the use of technology in on-line dispute resolution.

Readings: RESOLVING DISPUTES, pp. 649-666 (on-line disputes); 509-516 (international).

Assignment: Prepare for your on-line, eBay dispute resolution process.

THIRD GRADED WRITTEN ASSIGNMENT (40% of the course, graded anonymously using exam numbers, NOT names).

This last assignment will include arbitration but will cover the entire course, will be available at the end of class on November 20, and will be due via e-mail to Professor Whitby’s administrative assistant Carmen Mendoza (cmendoza@spenderfane.com) by 5:00 p.m. on FRIDAY, DECEMBER 1.