

Theory and Practice of Mediation

Fall 2017

Course Syllabus

Course Director: Professor Martha Simmons

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Location and Time

Theory and Practice of Mediation will take place on Tuesdays, in room 2008 (Osgoode), from 1:30 pm until 4:20 pm, unless otherwise scheduled.

Overview

Theory and Practice of Mediation offers students an opportunity to develop an understanding of the utility and impact of mediation within the context of dispute resolution developments in Ontario. Students will gain knowledge of mediation through seminars, simulations, placements in the Toronto Small Claims Court and final mediations. As well, the seminar provides an opportunity for students to undertake an interview assignment to examine theoretical issues discussed in the seminar.

The seminar includes:

- i. A Weekly Seminar that entails presentations and discussions of the current literature on mediation and reflections on student mediations;
- ii. Co-Mediations at Toronto Small Claims Court;
- iii. A Final Paper/ Interview Assignment; and
- iv. Final Simulated Mediations

Learning Objectives

By the end of this seminar, students should:

- Understand the place of mediation in the context of legal dispute resolution;
- Understand and apply mediation and other ADR theories (e.g., neutrality, confidentiality, interest-based, facilitative, evaluative mediation approaches) to understand and help to resolve court-related disputes;
- Understand the benefits and limitations of mediation and other dispute-resolution techniques so that they can responsibly counsel clients about their choices;
- Demonstrate professional self-awareness and reflection;

Weekly Seminar

The Weekly Seminar meets on Tuesdays from 1:30 to 4:20 pm and focuses on

contemporary mediation literature that addresses various issues in the development of mediation as an aspect of the administration of justice.

The Weekly Seminar examines the utility and impact of mediation in civil disputes, the ethical and professional issues and responsibilities that arise in mediation, and the role of culture and diversity in mediation. Considerable attention will be placed on the development of court-connected mandatory mediation in Canada. Students are also expected to analyze the successes and problems they have encountered in their mediations and to explore the role of mediation in the context of small claims disputes.

CO-MEDIATIONS

Students facilitate two, or, if possible, three co-mediations with a fellow student under the supervision of a mediation coach at Toronto Small Claims Court, located at 45 Sheppard Ave. or at the Brampton Small Claims Court, located at 7755 Hurontario St. Mediation coaches are LL.M. in ADR graduates, current LL.M. students, and experienced mediators.

Students are encouraged to attend at least one trial at Small Claims Court, preferably of a case that they were unable to resolve by mediation.

INTERVIEW ASSIGNMENT

Students are required to write a paper reflecting on an interview conducted with a mediation participant (mediator or counsel). This assignment will be assigned **60% of the final grade** for the course. The paper should be 15-20 double-spaced pages with one inch margins on each side, in Times New Roman 12 Font. You will be required to receive research ethics approval for this project, which will be discussed in the seminar. The assignment is due on **December 4, 2017 no later than 3:30pm and should be submitted to the Drop Box.**

Overview

You will interview someone who has been involved in a mediation within the last year. The interview should take about an hour. You will write a report summarizing the answers to the questions described below and describing insights you gained from the interview as they relate to the theoretical issues discussed in class.

The goals of the assignment are to provide you with the opportunity to: (1) learn from someone's experience in a mediation; (2) practice interviewing skills including receiving ethics approval, developing rapport and protecting confidentiality; and (3) reflect on how concepts we discuss in class apply in mediations. Details about the interview process and paper will be provided in a separate document.

Research Ethics Tutorial:

Although we will be discussed research ethics broadly and your specific responsibilities as researchers in class, we encourage you to familiarize yourself with the concepts outlined in the TCPS 2 Tutorial Course on Research Ethics (CORE). It can be accessed at <http://www.pre.ethics.gc.ca/eng/education/tutorial-didacticiel/> (Government of Canada Panel on Research Ethics website).

About the Interview

The person you interview should be a mediator. You will ask the subject to describe their most recent mediation. This may or may not have resulted in an agreement. You may want to choose someone who works in an area of law in which you have particular interest. We will discuss possible recruitment methods to reach potential subjects, and Professors Simmons and Bevilacqua can assist you in this regard at any point in this process. You can also ask your coaches in Small Claims Court if they would be willing to act as interviewees.

You will contact the person you want to interview and arrange to conduct the interview in person, by phone, or by video-chat. If you need help identifying someone to interview, contact Professor Simmons.

You **MUST** have the subject complete a consent form to participate in the interview. A sample consent form can be found on the course Moodle. This form can be emailed to the subject and then sent back to you before the interview or can be signed at the outset of the interview if it is in person. We will discuss research ethics in detail in the seminar.

At the outset of the interview, you should once again confirm consent and remind the subject that you will not disclose his or her name or anyone mentioned in the interview. To further protect confidentiality, you **MUST** tell the subject not to mention anyone else's name and, instead, use generic descriptions. You **MUST** tell the subject not to provide any information that might be relevant in future litigation.

Start the interview by asking about the subject's background. After deciding what case to discuss, ask the subject to tell the story of the case. You are free to conduct the interview however it would be most effective. Ask follow-up questions that seem important to you, especially to clarify things that you don't understand. Often, it is a good idea to wait to ask follow-up questions until after you finish learning the chronology because the follow-up questions may distract from the chronology and cause you to miss important events. Pay particular attention to anything that seems unusual or surprising and ask follow-up questions. Whenever appropriate, ask the subject about others' perceptions of particular issues. For example, you might ask how the other side viewed an issue.

In any case, your report must include information about the questions listed below, particularly about the chronology of events and your insights from the interview.

After you finish asking about the chronology of the case, review the following list of questions and ask any that the subject did not previously address. You do not need to ask these questions if you know the answers from responses to earlier questions.

More information about conducting and summarizing interviews will be provided separately.

Questions to Be Addressed

The subject

- How often do you participate in mediations?
- Do you have any particular training in mediation?

The subject matter of the case

- Would you describe the parties, without identifying them by name?
- What type of issue was involved (e.g., real estate, personal injury, business deal)?
- Was this a mandatory mediation?

The parties and the context of the case

- Did the parties have a relationship before the matter began?
- At the outset of the matter, did the parties expect to have a continuing relationship after the case was over?
- Did the lawyers have a relationship before the case began?
- What do you think was most important to each party in this case?
- Did lawyers represent any or all of the parties during the matter? What was the effect of the representation?

The mediation process

- What, if anything, did you do to prepare for the mediation?
- How did the mediation begin?
- Did the mediation take place mostly in caucus or in joint session?
- Was there any discussion of non-monetary forms of resolution?
- How much, if at all, did people talk about legal issues or what would happen if they went to court?
- How much, if at all, did people talk about their real goals underlying their positions (as opposed to the justifications of their positions)?
- Did the parties reach an agreement?
- Why do you think that they [reached / did not reach] an agreement?

Assessment of the case

- What do you think were the critical factors causing the mediation to turn out as it did?
- How satisfied were you with the outcome? Why?
- How satisfied were you with the process? Why?

Writing Your Paper

You have limited space to summarize the interview, so carefully decide what is most important to include. In general, the purpose of this assignment is for you to learn about the reality of a case in some detail, including the subject's assessment of it. In describing this part of the assignment, be objectively descriptive, use plain English (not dispute resolution terminology), and generally avoid expressing your judgment about the parties, actions, decisions, etc.

Your narrative should begin with a brief description of the interview subject including information that would help readers assess the report (such as the subject's past experience with similar cases, if any). Your report should include brief descriptions of the key people and entities in the negotiation, but they **MUST NOT** include any details that could reasonably identify the subject or any parties. The report **MUST** use pseudonyms referring to the people and entities in the case. The pseudonyms **MUST** be sufficiently different from the real names that it would be impossible to identify them. In keeping with the serious nature of this assignment, the report must use plausible names, not silly ones.

The report **MUST NOT** include specific dates. The chronology should begin with the first relevant event and refer to subsequent events in relation to other events in the chronology. For example, a narrative might identify the timing and sequence by saying "two months later."

The report **MUST** avoid using specific dollar amounts and should instead use general descriptions. For example, reports might use language such as "more than \$10,000" or "in the low six figures." When there is an exchange of offers, the reports should include information indicating how the figures compare with each other without using specific figures. For example, a report might state that a plaintiff demands \$X and the defendant offered \$X - \$100,000. Or a defendant offered \$Y and plaintiff demanded \$5Y (i.e., five times Y).

Your paper **MUST** prominently include the following legend at the top: "Note: Details of this case, including the names of individuals, have been omitted or changed to protect the confidentiality of the data."

Following the narrative, under a separate heading, your report must address possible alternative explanations of the events. For example you might describe limitations of the accounts due to getting only one person's perspective, limitations of the subject's memory, subject's role in the dispute, the subject's desire to present a positive image.

After the discussion of possible alternative explanations, under a separate heading, discuss your insights about what you learned from the interview and how the case was similar and/or different from concepts discussed in this course. In this part of the paper, you may use dispute resolution terminology and refer to course readings, simulations, and class discussions.

This final section should also describe how this case impacts your thinking about handling cases in the future. Of course, you won't encounter the exact same situation in the future, considering differences in parties, lawyers, facts, issues, etc. So any lessons for the future necessarily should be qualified.

FINAL MEDIATIONS

The Final Mediations are assigned **20% of the final grade**. All students will participate in a simulated co-mediation. The mediation will be similar to mediations undertaken

during the semester in Small Claims Court and in the seminar simulations. The co-mediation will be videotaped for assessment purposes. Students are responsible for the videotaping and submission. Students will also be asked to reflect on their roles as a co-mediator. Students will be evaluated on the development of their mediation skills.

A written reflection should be submitted to Professor Simmons on **November 28, 2017** either in person or by email. The reflection should be no more than two pages in length and should discuss the positive and negative reflection of the mediation assessment. It should also say what the student would do differently next time, given the same set of circumstances.

PARTICIPATION

Participation is assigned **20%** of the final grade and includes class participation and active participation in all other aspects of the course. All students are expected to prepare for class, at a minimum, by reading the assigned portions of the text and articles. Class participation includes contributing to the weekly seminars in a number of ways, including: active participation in class discussions and exercises, verbally reflecting on Small Claims Court mediations, and creating a collaborative learning environment that respects and values the contributions of all participants.

Questions on Readings

Before each class, students are required to submit two questions arising out of the readings that are intended to spark conversation about the material. These questions can relate topics to each other or can relate your experiences to the readings. Questions should be emailed to BOTH Professor Simmons and JP Bevilacqua no later than midnight the night before class.

Case Rounds

All students will be expected to discuss the cases that they mediate in Small Claims Court. Working in teams, all students will be expected to make at least two such "case rounds" presentations during the course of the semester. You will be asked to make a five- or ten-minute presentation to the class laying out the factual background of the case, the conflict dynamics between the parties, and then presenting any skills, ethics or role questions that you encountered in the mediation and the context in which the question or problem arose. The object here is for everyone to learn from situations that each of you may have found challenging, interesting or surprising.

Anything that you think would raise fruitful issues for class discussion is fair game. Treat this as a learning opportunity, and keep in mind that generally the best learning often occurs when you don't think that you (or your co-mediator, or your mediation supervisor) handled a situation well and you candidly seek the advice of your classmates on how things might have gone better. Consider yourself the instructor in these presentations, responsible for asking good questions and facilitating an interesting and productive class discussion.

Please email Professors Simmons and Bevilacqua at least 24 hours in advance of class if you want to present a case issue in class, providing the basic facts of the case and the specific questions you would like to raise. This will enable us to work with you if necessary to tweak and deepen your questions, as well as to construct an overall agenda for the class session.

Osgoode Public Interest Requirement (OPIR)

Students may claim hours toward the fulfilment of the Osgoode Public Interest Requirement (OPIR) for mediating in Small Claims Court. Eligible time includes activities in Small Claims Court that are connected to an actual dispute, including talking to the parties collectively or individually, facilitating a mediation in open session and in caucus, finalizing a written settlement agreement and appearing before the court during or after the mediation. Any other activities in TPM will not qualify for OPIR, including training and preparing for Small Claims Court mediations, travelling to and from Small Claims Court, waiting for a Small Claims Court mediation, and debriefing with coaches after a Small Claims Court mediation.

General Assignment Information

Format

Unless otherwise indicated, all assignments are to be typewritten using Times New Roman 12-point font, double-spaced, and printed on 8.5 x 11 inch, plain white paper unless the assignment instructions allow for electronic submission.

Lateness

All assignments must be submitted on time. Failure to meet assignment due dates will result in a 5% reduction in the student's grade for each day late. If the final research paper is not submitted on time, it is automatically given an F grade and the student must deal directly with Associate Dean, Students, Mya Rimon.

Course Materials

Picard, Cheryl, Peter Bishop, Rena Ramkay and Neil Sargent, *The Art and Practice of Mediation* (2d Ed.) (Emond Montgomery Publications: Toronto, 2015) [Textbook]

All other required readings can be accessed electronically on Moodle or by visiting the library website.

Evaluation

Research Paper	60%
Final Mediation and Reflection	20%
Participation (Including seminar and SCC Mediations)	20%

Students can receive feedback on their final grades by contacting Professor Simmons by email in January 2018. Feedback will be provided in individual meetings or telephone calls.

Course Overview and Content

Week	Date	Topic	Readings
1.	Tuesday August 29, 2017	Introduction: Course expectations/syllabus review and The Addition film viewing	Course syllabus Textbook Chapter 1, 2
2.	Tuesday, September 5, 2017	Understanding Conflict and Communication in Mediation	Textbook Chapter 3, 4, 5
3.	Tuesday, September 12, 2017	Mediation Training and Master Class	Textbook Chapter 6, 7
4.	Tuesday September 19, 2017	Continued Training Students will learn the process and skills of mediation through simulations and role-plays, and will receive individual feedback.	
5.	Tuesday, September 26, 2017	Small Claims Court Preparation and Intro to Mandatory Mediation	Small Claims Court Rules
6.	Tuesday, October 3, 2017	Trip to Small Claims Court	We will meet at the Small Claims Court at 47 Sheppard at 2:00 and will leave by 3:30 to allow time to get back to campus.
7.	Tuesday October 10, 2017	Mediation and Justice What is the relationship between mediation and justice? Can mediation deliver justice?	Textbook Chapter 10 Robert A. Baruch Bush & Joseph P. Folger, "Mediation and Social Justice: Risks and Opportunities" (2012) 27 Ohio State Journal on Dispute Resolution 1. Jacqueline Durand, "The Institutionalization of Mediation and its Effect on Unrepresented Parties: Is Justice Really the Goal of Court-Mandated Mediation?" (2016) 29 Geo. J. Legal Ethics 973. Sherif Elnegahy, "Can Mediation Deliver Justice?" (2016-2017) 18

			Cardozo J. Conflict Resol. 759.
8.	Tuesday October 17, 2017	Using Mediation in Organizations and Communities	Textbook Chapter 11 Trevor C.W. Farrow, “Dispute Resolution, Access to Civil Justice and Legal Education” (2005) 42 Alta. L. Rev. 741-801. Colleen M. Hanycz, “Whither Community Justice? The Rise of Court-Connected Mediation in the United States” (2007) 25 Windsor Y.B. Access Just. 167.
9.	Tuesday October 24, 2017	Ethical Issues in Dispute Resolution – Confidentiality, Neutrality, Codes of Conduct DISCUSSION OF RESEARCH ETHICS	Brad Honoroff and Susan Opotow, “Mediation Ethics – A Grounded Approach” (April 2007) Negotiation Journal 23(2) 155-172. Julie Macfarlane, “Mediating Ethically: The Limits of Codes of Conduct and the Potential of a Reflective Practice Model” (2002) 40 Osgoode Hall Law Journal 50. <i>Union Carbide v. Bombardier</i> , 2014 SCC 35.
10.	Tuesday October 31, 2017	Issues of Gender in Mediation	Amy Cohen, “Gender: An (un)useful category of prescriptive negotiation analysis” (2003-2004) 13 Texas Journal of Women and the Law 169. Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100 Yale Law Journal 1545. Menkel-Meadow, “Portia in a Different Voice: Speculations on a Women 's Lawyering Process” Rifkin, “Mediation from a Feminist Perspective: Promise and

			Problems” Daniel Del Gobbo, “The Feminist Negotiator's Dilemma”
	Tuesday November 7, 2017	NO CLASS (READING WEEK)	
11.	Tuesday November 14, 2017	Culture, Power and Diversity in dispute resolution	<p>Bear, Leroy Little. "Jagged worldviews colliding." <i>Reclaiming Indigenous voice and vision</i> (2000): 77.</p> <p>Borrows, John. "With or without you: First Nations law (in Canada)." <i>McGill LJ41</i> (1995): 629.</p> <p>Francis - Infusing Dispute Resolution with Culture</p> <p>Hewitt, Jeffery G. "Indigenous Restorative Justice: Approaches, Meaning & Possibility." <i>UNBLJ</i> 67 (2016): 313.</p> <p>Jackson - ADR in Aboriginal Communities</p> <p>M. LeBaron & Z. Zumeta, “Windows on Diversity: Lawyers, Culture, and Mediation Practice” (2003) 20(4) Conflict Resolution Quarterly 463.</p> <p>Napoleon, Val. "Thinking about Indigenous legal orders." <i>Dialogues on Human Rights and Legal Pluralism</i>. Springer Netherlands, 2013. 229-245.</p> <p>Press - Mediation and Minorities</p>
12.	Tuesday November 21, 2017	Mediation Assessment	
13.	Tuesday	Final Class – Reflections	

	November 28, 2017	on the term	
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	Monday December 4, 2017	FINAL ASSIGNMENTS DUE	All papers should be submitted to the dropbox by 3:30pm.
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Osgoode and York Academic Policies

a. Academic Honesty and Integrity

Osgoode students are required to maintain high standards of academic integrity and are subject to the York Senate Policy on Academic Honesty and the relevant Osgoode Academic Rules. The Senate Policy can be found at <http://www.yorku.ca/secretariat/policies/document.php?document=69> The York University academic integrity website can be found at <http://www.yorku.ca/academicintegrity>

The Senate Policy and Osgoode Academic Rules are also found in the Student Handbook, which is available on the MyOsgoode website, under the Documents and Publications tab.

b. Religious Observance

York University is committed to respecting the religious beliefs and practices of all members of the community, and making accommodations for observances of special significance to adherents. Should any of the dates relating to examinations or assignments for this course pose such a conflict for you, please let Assistant Dean, Students, Mya Rimon, know within the first three weeks of class.

c. Students with Disabilities and Accommodation Needs

York University has a range of resources to assist students with physical, mental, and learning disabilities/challenges in achieving their educational objectives. Students with disabilities requiring accommodation in the classroom or in the examination or evaluation process are encouraged to identify themselves to York's Counselling & Disability Services office (N110, Bennett Centre for Student Services or 416-736-5297) or Osgoode's Office of Admissions & Student Services as soon as possible. Students seeking accommodation in experiential education settings are encouraged to read the *Accommodation Information for Clinical & Intensive Program* handout provided to them with their enrolment offer. All requests for accommodation will be kept confidential.

Requests for accommodation for in-term work must be made, in writing, to either the instructor or to the Assistant Dean, Students, Mya Rimon. Such requests must be made as soon as the need for accommodation arises and, barring exceptional circumstances, in advance of the deadline for the work.

Requests for accommodation for final examinations and final papers may only be made to and approved by the Assistant Dean, Students, Mya Rimon and must be made in advance of the examination date or final paper due date.

d. Other York University Policies, including Ethics Review Process

Further information concerning relevant York University academic policies, such as the Ethics Review Process for research involving human participants is available on the Senate Committee on Academic Standards, Curriculum and Pedagogy webpage (see Reports, Initiatives, Documents) –

<http://www.yorku.ca/secretariat/senate/committees/ascp/index-ascp.html>