

**CLINICAL TEACHING COURSE**

**FULL TERM ELECTIVE COURSE**

**COURSE TITLE: Negotiation & Mediation – Principles & Practice**

**FACULTY NAME: Ashwin Mishra**

**ABOUT THE FACULTY:** Prof. Ashwin Mishra is an Associate Dean and Associate Professor of Law at RVU University School of Law. He has secured an LL.M. in Dispute Resolution from the Straus Institute for Dispute Resolution at Pepperdine University School of Law, and a B.A. LL.B. (International Trade & Investment Law Hons.) from National Law University Jodhpur, India. He has also previously served as the Associate Dean & Assistant Professor of Law at the Jindal Global Law School, O. P. Jindal Global University, Sonapat, Haryana. Prior to joining academia, he has also worked as a Senior Associate in the Commercial Dispute Resolution Team at Lakshmikumaran & Sridharan, Attorneys, in New Delhi, where he worked with and advised clients from both India and abroad, while also appearing for them in disputes before the Supreme Court of India and various High Courts, as well as several quasi-judicial forums and tribunals.

**COURSE DESCRIPTION**

Negotiation and Mediation feature as part of most of our day-to-day interactions with our fellow members of society. Negotiation involves strategic information gathering and behavior influencing to get what you want. Its “communication with results.” Where such a negotiation is assisted or facilitated by third parties, the process is classified as Mediation.

For those of you planning on going into the legal profession, negotiation and mediation are particularly important for practicing lawyers. Much of a lawyer’s interpersonal time is spent negotiating or facilitating negotiation. This course is designed to introduce students to the theory and practice of negotiation and mediation as a process used in both transaction planning and dispute resolution for lawyers and non-lawyers alike.

Unlike other skills, negotiation and mediation is not purely dictated by legal propositions but is more a skill that can be learned and developed with practice. It is both an art and a science and for the creative ones, there is a lot of scope for creativity.

The focus of this class will be to help you approach future negotiations in a more knowledgeable manner so that you become a better negotiator. In order to achieve this, an emphasis will be placed on developing awareness of how one can improve as a negotiator and on helping others improve as negotiators. Hopefully this class will help provide you with a framework for continuing to improve your negotiation skills long after the class has ended.

**COURSE OBJECTIVE(S)**

1. Increase understanding of the dynamics of negotiation and mediation to facilitate alternatives to traditional forms of dispute resolution;
2. Learn to strategically approach negotiations and mediations;
3. Increase proficiency in both the distributive and integrative bargaining processes;
4. Learn how to prepare for negotiation and mediations;
5. Identify personal negotiation styles & aid students to lean into them to facilitate more effective outcomes through ADR processes;
6. Improve ability to overcome barriers to negotiation and mediation;
7. Consider the ethical implications of negotiation and mediation;

**IMPROVEMENT ON THE PREVIOUS ITERATION OF THE COURSE** – This is the first time this course is being offered at NLSIU

**COURSE PRE-REQUISITES IF ANY** – No pre-requisites

**CAN YOUR COURSE BE CROSS LISTED AND OFFERED TO MPP (policy) STUDENTS TOO?** - Yes

## **EVALUATION PATTERN**

- (1) Class Participation – 10 Marks
- (2) Negotiation Plan – 30 Marks
- (3) Mediation Simulation – 30 Marks
- (4) Term Paper – 30 Marks

## **BASIC READINGS – Prescribed text book(s):**

1. Golann, D. & Folberg, J., *Mediation: The Roles of Advocate and Neutral* (3d ed., New York: Wolters Kluwer 2021)
2. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021).

## **WEEK-WISE DISTRIBUTION OF COURSE SYLLABUS & CLINICAL COMPONENT**

### **WEEK 1**

#### **Session 1 –Why study Negotiation & Mediation?**

1. How is ADR different from conventional forms of dispute resolution?
2. What are the different forms of ADR?
3. How has ADR evolved over time? Where are we now in terms of the role that ADR plays in the process of dispute resolution globally and nationally?
4. What are the advantages and disadvantages of opting for ADR mechanisms for dispute resolution?

#### **Session 2 – History and Evolution of ADR in India**

5. What are the religious origins of ADR?
6. How have the Global ADR trends influenced the evolution of ADR in India?
7. What steps have been taken by India to promote ADR?

#### **Readings:**

1. Roscoe Pound, 'The Causes of Popular Dissatisfaction with the Administration of Justice', (1906) 40 AM. L. REV. 729.
2. Afcons Infrastructure v. Cherian Varkey, (2010) 8 SCC 24.

3. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021). – Chapter 1.

Note: Week 1 focuses on laying the foundation for the course and orienting students prior to introducing them to the nuances of mediation and negotiation as practices for dispute resolution.

Additional Suggested Readings:

1. Korobkin, R., *Negotiation Theory & Strategy*, 3d.ed. (Frederick, MD: Aspen Publishing, 2014). – Part I – Towards a Conceptual Approach to Negotiation
2. Menkel-Meadow, Carrie J., Schneider, Andrea K. & Love, Lela P., *Negotiation: Processes for Problem Solving*, (3d.ed., Frederick, MD: Aspen Publishing, 2021).
3. Herrman, Margaret S., ed. *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (Malden, MA: Blackwell Publishing, 2009).
4. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015). – Chapter 1 – Introduction to the Art & Practice of Mediation

## **WEEK 2**

### **Session 3 – Introduction to Negotiation & Mediation**

- How do parties make their choice of dispute resolution mechanism?
- What are the differences between mediation & conciliation?
- Making the choice between negotiation and assisted negotiation

### **Session 4 – Negotiation & Mediation Styles**

- Communication in Negotiation & Mediation
- Choosing between Cooperation & Competitiveness
- Personality & Persona in Negotiations

Readings:

1. Fisher, Roger & Ury, William, *Getting to Yes: Negotiating Agreement Without Giving In* (3rd ed. 2011).
2. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021). – Chapter 3.

Additional Suggested Readings:

1. Korobkin, R., *Negotiation Theory & Strategy*, 3d.ed. (Frederick, MD: Aspen Publishing, 2014). – Part III: The Negotiators and their Relationship
2. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapters 1, 2 & 6.
3. Cordell, A., *The Negotiation Handbook*, (London; New York: Routledge, Taylor & Francis Group, 2019). – Phase 2 & 3 – Relationship Building & Information Gathering
4. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015). – Chapters 5 & 7 – Conflict & Communication, Cultivating Constructive Dialogue in Mediation.

#### Exercises for Week 2

- (i) Differentiating between Dolphins & Sharks – When the carrot & when the stick.
- (ii) Identifying need for Intervention – When is it needed and when is it best avoided?

### **WEEK 3**

#### **Session 5 – Negotiation Steps (Part I)**

1. Setting Goals
2. Preparation
3. Initial Interaction
4. Information Exchange

#### **Session 6 – Negotiation Steps (Part II)**

5. Bargaining
6. Developing Solutions

#### Readings:

1. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021). – Chapters 4 & 5

Additional Suggested Readings:

1. Korobkin, R., *Negotiation Theory & Strategy*, 3d.ed. (Frederick, MD: Aspen Publishing, 2014). – Part II: The Structure of Negotiation.
2. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapters on Bargaining (Chapter 6 & 7).
3. Cordell, A., *The Negotiation Handbook*, (London; New York: Routledge, Taylor & Francis Group, 2019). – {Phase 3, 4 and 5 – Information Gathering, Using & Bidding}
4. Menkel-Meadow, Carrie J., Schneider, Andrea K. & Love, Lela P., *Negotiation: Processes for Problem Solving*, (3d.ed., Frederick, MD: Aspen Publishing, 2021). – Relevant Chapters.
5. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015). – Chapter 8&9.

Exercises for Week 3

- (i) Introductions – How to structure and adjust to situations and conflicts?
- (ii) Asking Questions – How to solicit information through engagement? – Playing the question game.
- (iii) Anticipation of Opposition Strategy – Developing Crystal Balls
- (iv) Resolution Analysis – Finding Creative Solutions to Problems

**WEEK 4**

**Session 7 – Negotiation Steps (Part III)**

- Closure
- Finalizing Agreement

**Session 8 – The Client Counsel Relationship – Defining the Roles & responsibilities**

- Identifying points of intervention and engagement
- Evaluation of Impact of participation

Readings:

1. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021). – Chapters 6 & 11.

Additional Suggested Readings:

1. Korobkin, R., *Negotiation Theory & Strategy*, 3d.ed. (Frederick, MD: Aspen Publishing, 2014). – Part IV: Additional Parties
2. Walker, Stephen, *Mediation Advocacy: Representing and Advising Clients in Mediation*, 2nd ed. (New York: Bloomsbury Professional, 2018).
3. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapter 7 – The How to of Conducting Mediation
4. Cordell, A., *The Negotiation Handbook*, (London; New York: Routledge, Taylor & Francis Group, 2019). – Phase 6 – Closing the Deal
5. Menkel-Meadow, Carrie J., Schneider, Andrea K. & Love, Lela P., *Negotiation: Processes for Problem Solving*, (3d.ed., Frederick, MD: Aspen Publishing, 2021). – Relevant Chapters on Closing
6. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015). – Chapter 9 – Reaching Decisions & Completing the Mediation Process

Exercises for Week 4

- (i) Who says what? – Identifying what is important to the parties
- (ii) Codification – Making Agreements

**WEEK 5**

**Session 9 – Negotiation Simulation - Evaluation**

**Session 10 – Negotiation Simulation - Evaluation**

**WEEK 6**

**Session 11 – Meditation – Styles & Approaches**

- Differentiating between Mediation & Conciliation

- How to be a balanced Mediator?
- Drawing boundaries and identifying the goals of the mediation process

## **Session 12 – Mediation – Practical Techniques & Considerations**

- Introductions & ground rules
- Focus on Confidentiality
- Asking the right questions
- How to be a balanced Mediator?
- Drawing boundaries and identifying the goals of the mediation process

Readings:

1. Golann, D. & Folberg, J., *Mediation: The Roles of Advocate and Neutral* (3d ed., New York: Wolters Kluwer 2021) – Chapters 5 & 6.

Additional Suggested Readings:

1. Cole, Sarah Rudolph; McEwen, Craig; Rogers, Nancy H.; Coben, James Richard; Alexander, Nadja; & Thompson, Peter N., *Mediation: Law, Policy & Practice* (2020-2021 Edition). – Chapter 3.
2. Walker, Stephen, *Mediation Advocacy: Representing and Advising Clients in Mediation*, 2nd ed. (New York: Bloomsbury Professional, 2018). – Chapters 11, 12 & 13.
3. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapter 10 – Advice for Mediators.
4. Herrman, Margaret S., ed. *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (Malden, MA: Blackwell Publishing, 2009). – Relevant Introductory Chapters.
5. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015).
6. Dunna, Gracious T., *Conciliation & Mediation in India*, (Alphen aan den Rijn, Kluwer Law International BV, 2022). – Relevant Chapters

Exercises for Week 6

- (i) Mediator Introduction
- (ii) Keeping Quiet – Challenges for Legal Practitioners in Mediator roles

- (iii) The Kobayashi Maru Problem in Mediation – What is the goal? – The solution or the process?

## **WEEK 7**

### **Session 13 – The Art of Caucusing – Use & Significance**

1. Caucus as a mediator – when and how to use it?
2. Caucusing as a negotiator – when and how to use it?
3. Is it always necessary? When do we use, and when do we avoid?

### **Session 14 – Barriers to Settlement – Addressing Issues in Mediation**

4. Gender
5. Economic inequalities
6. Socio-political considerations
7. Trust & Faith building
8. Creation of safe spaces

#### Readings:

1. Golann, D. & Folberg, J., *Mediation: The Roles of Advocate and Neutral* (3d ed., New York: Wolters Kluwer 2021) – Chapter 4, 10 & 11.

#### Additional Suggested Readings:

1. Cole, Sarah Rudolph; McEwen, Craig; Rogers, Nancy H.; Coben, James Richard; Alexander, Nadja; & Thompson, Peter N., *Mediation: Law, Policy & Practice* (2020-2021 Edition). – Chapter 11 Fairness, Effectiveness & Access.
2. Walker, Stephen, *Mediation Advocacy: Representing and Advising Clients in Mediation*, 2nd ed. (New York: Bloomsbury Professional, 2018). – Chapter 21
3. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapter 6
4. Herrman, Margaret S., ed. *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (Malden, MA: Blackwell Publishing, 2009). Relevant Chapters.
5. Picard, C. A., Sargent, N., Bishop, P. J., & Ramkay, R. (Eds.). (2015). *The Art and Practice of Mediation*, 2nd ed. (Toronto, Emond Montgomery Publications, 2015). Chapter 4 – Understanding Conflict Behaviour

6. Dunna, Gracious T., *Conciliation & Mediation in India*, (Alphen aan den Rijn, Kluwer Law International BV, 2022). Relevant Chapters

Exercises for Week 7

- (i) Asking the right questions in caucusing – Information Solicitation
- (ii) Timing – Resisting the Intervention urge

## **WEEK 8**

### **Session 15 – Negotiation & Mediation Ethics**

### **Session 16 – Dealing with Sensitive Negotiations & Mediations**

- Housing Disputes
- Sexual Harassment & Violence related disputes
- Learning to walk away – Making determinations of whether Mediation & Negotiation are viable

#### **Readings:**

1. Folberg, J. & Reynolds, J., *Lawyer Negotiation: Theory, Practice, and Law* (4d ed. 2021). – Chapters 8 & 10.

#### **Additional Suggested Readings:**

1. Cole, Sarah Rudolph; McEwen, Craig; Rogers, Nancy H.; Coben, James Richard; Alexander, Nadja; & Thompson, Peter N., *Mediation: Law, Policy & Practice* (2020-2021 Edition). – Chapter 15
2. Panchu, Sriram, *Mediation - Practice and Law: The path to Successful Dispute Resolution*, 3rd ed. (Nagpur: Lexis Nexis Butterworths Wadhwa, 2011). – Chapter 11.
3. Herrman, Margaret S., ed. *The Blackwell Handbook of Mediation: Bridging Theory, Research, and Practice* (Malden, MA: Blackwell Publishing, 2009). – Chapter 17.
4. Folberg, J., Milne, A., & Salem, P., eds., *Divorce and Family Mediation: Models, Techniques, and Applications*. (New York: Guilford Press, 2004).
5. Dunna, Gracious T., *Conciliation & Mediation in India*, (Alphen aan den Rijn, Kluwer Law International BV, 2022).

Exercise for Week 8

(i) Adapting Original Approaches to Specific Mediations

**WEEK 9**

**Session 17 – Mediation Act Overview**

**Session 18 – Comparative Mediation Law**

- Where are we Globally on Mediation law and enforcement?

**WEEK 10**

**Session 19 – Mediation Simulation - Evaluation**

**Session 20 – Mediation Simulation - Evaluation**

**Prescribed Word limit for Term Paper – 2500 words, including footnotes**

**Academic Integrity and Honesty**

Learning and knowledge production of any kind is a collaborative process. Collaboration demands an ethical responsibility to acknowledge who we have learnt from, what we have learned, and how reading and learning from others have helped us shape our own ideas. Even our own ideas demand an acknowledgement of the sources and processes through which those ideas have emerged. Thus, all ideas must be supported by citations. All ideas borrowed from articles, books, journals, magazines, case laws, statutes, photographs, films, paintings, etc., in print or online, must be credited with the original source. If the source or inspiration of your idea is a friend, a casual chat, something that you overheard, or heard being discussed at a conference or in class, even they must be duly credited. If you paraphrase or directly quote from a web source in the examination, presentation or essays, the source must be acknowledged. The university has a framework to deal with cases of plagiarism. All form of plagiarism will be taken seriously by the University and prescribed sanctions will be imposed on those who commit plagiarism.

### **Safe Space Pledge**

This course may discuss a range of issues and events that might result in distress for some students. Discussions in the course might also provoke strong emotional responses. To make sure that all students collectively benefit from the course, and do not feel troubled due to either the contents of the course, or the conduct of the discussions, it is incumbent upon all within the classroom to pledge to maintain respect towards our peers. This does not mean that you need to feel restrained about what you feel and what you want to say. Conversely, this is about creating a safe space where everyone can speak and learn without inhibition and fear. This responsibility lies not only on students, but also the instructor.

### **Plagiarism**

Any idea, sentence or paragraph you cull from a web source must be credited with the original source. If you paraphrase or directly quote from a web source in the exam, presentation or essays, the source must be explicitly mentioned. You should not feel free to plagiarize content, be it from scholarly sources (i.e. books and journal articles) or from the internet. This is an issue of academic integrity on which no compromise will be made, especially as students have already been trained in the perils of lifting sentences or paragraphs from others and claiming authorship of them. (students are advised to note that violating the confidentiality guidelines will entail disciplinary action)