

Dispute Resolution Theory and Practice
LAW 337 Fall, 2009
University of Victoria
Instructor: Catherine Morris

COURSE OUTLINE
(subject to amendment)

Course description

This course will examine the forms and functions of major disputing processes - mediation, negotiation and adjudication. These are the processes which are critical to lawyers and other persons concerned with preventing or resolving disputes. Both court adjudication and alternative dispute resolution (ADR) will be studied from theoretical, critical and practical perspectives. The course will also examine and develop the skills used in various dispute resolution procedures.

Course Instructor, dates, website

- **Instructor:** Catherine Morris, BA, LLB (Alberta), LLM (UBC)
- **Location of classes:** Fraser building room TBA
- **Dates of classes:** Wednesdays, September 9 to December 2, 2009, 3:30 to 6:30 pm (No class Wednesday November 11, 2009)
- **Location of office:** No on-campus office.
- **Office Hours:** Students are always welcome to email or arrange appointments.
- **Contact Information:** Telephone 250-477-0129; or e-mail cmorris@uvic.ca
- **Course website:** <http://www.lampion.bc.ca/University/UVic/UVicDRfall2009.html>

Texts

Required texts:

- Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008.
- Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008.
- Catherine Morris. *The Good Negotiator: Negotiation Theory, Processes and Skills for Lawyers*. Negotiation workshop manual. Victoria: Catherine Morris, 2009, available at www.lampion.bc.ca/University/Chulalongkorn/MorrisNegotiationManualMay2009.pdf.
- Additional readings (available online or on reserve in the Priestly Library)

Suggested text:

- Sandra Cheldelin, Daniel Druckman, and Larissa Fast, eds. *Conflict: From Analysis to Intervention*. Continuum Books, 2003.

Course Objectives

By the end of this course, it is envisioned that participants will:

- be aware of several approaches to decision making and conflict resolution, including negotiation, mediation (and conciliation), arbitration, litigation and legislation.
- be able to assess a problem or conflict to determine its suitability for negotiation, mediation, adjudication or other approaches;
- understand several types of negotiation and dispute resolution, including distributive and integrative approaches;
- understand several strategies for negotiation and dispute resolution, including competitive and cooperative approaches;
- be able to prepare for negotiation and mediation;
- understand and apply a process of interest-based negotiation or mediation;
- understand several listening and communication skills for dispute resolution;
- have considered topics of emotions, power, culture and gender in dispute resolution;
- have considered several ethical issues in negotiation and dispute resolution;
- have considered several critiques and public policy issues regarding alternative dispute resolution.

Instruction Methods

Methods of instruction include:

- readings,
- lectures,
- informal student presentations and class discussions,
- research and writing assignments.

Course Assignments and Evaluation

- ***Class attendance and preparation (20%).*** Students are expected to make the necessary arrangements to prepare for and attend all classes and participate in all class exercises. This component of the course is evaluated based on punctual attendance and evidence of good preparation of required readings or other assignments.
- ***First Assignment (5%). Due September 11, 2009.*** See opening assignment details at <http://www.lampion.bc.ca/University/UVic/CaseStudyAssignmentDRFall2009.pdf>.
- ***Mid-term assignment (25%).*** This assignment is distributed by Wednesday October 14 and is due at 3:30 pm Wednesday, October 21, 2009. Students are expected to be familiar with all assigned readings, relevant cases, legislation and class material covered up until October 14 (inclusive).
- ***Final Writing Assignment (50%):*** Final paper due Wednesday December 2, 2009
 - ***Length:*** Please write a paper of 3,000 to 3,500 words or about 12-14 pages (maximum) on a topic of interest to the student. Paper length excludes notes, references and diagrams. Marks may be deducted for excess.
 - ***Criteria for evaluation:*** Students' papers are expected to demonstrate knowledge of all relevant course readings as well as relevant external research. See grading criteria at <http://www.lampion.bc.ca/University/UVic/GradingCriteria.pdf>. See Faculty Grading Standards: www.law.uvic.ca/current/academic_regs.php#grading
 - ***October 31:*** It is recommended (but not required) that students submit by email a

- topic, abstract, outline and preliminary list of references before October 31, 2009.
- **December 2:** Final papers are submitted to the instructor in hard copy by Friday December 2, 2009, at 3:30 pm.
- **Deadlines, equality and extensions:** To ensure relative equality of opportunity among students, marks of students who, without prior arrangement, submit papers later than the deadline of December 2, 2008 at 3:30 pm have marks reduced at the rate of 2% of the total course grade for each day (or part of a day) past the deadline. Extensions (without marks reduction) are given for reasons of illness or emergency (including family emergency) with permission of the Associate Dean.

Proposed course schedule

1. What is “Dispute Resolution?”: Roles of lawyers

One class (September 9)

- Note there is an assignment due September 11, 2009 (no extensions available).

Readings: Students are expected to read the following in preparation for the first class:

- ▶ Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008, chapters 1 and 2 (3-37). (30 pages)
- ▶ Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008, preface and chapters 1 and 2 (52 pages).
- ▶ Morris, Catherine. *The Good Negotiator: Negotiation Theory, Processes and Skills for Lawyers*. Negotiation workshop manual. Victoria: Catherine Morris, 2009, 3-9. (6 pages)
- ▶ Morris, Catherine. Definitions in the Field of Conflict Transformation. Victoria: Peacemakers Trust, available online at <http://www.peacemakers.ca/publications/ADRdefinitions.html> (9 pages)

2. Understanding Conflicts and Disputes

One class (September 16)

Required readings:

- ▶ William L.F. Felstiner, Richard Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81) 15(3-4) *Law & Society Review* 631-654 (Coursepack) (32 pages)
- ▶ Morris, Catherine. *The Good Negotiator: Negotiation Theory, Processes and Skills for Lawyers*. Negotiation workshop manual. Victoria: Catherine Morris, 2009, 13-18 (6 pages).
- ▶ Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008, chapter 3, 4 (50 pages).
- ▶ OPTIONAL: Sandra Cheldelin, Daniel Druckman, and Larissa Fast, eds. *Conflict:*

From Analysis to Intervention. New York, LonContinuum Books, 2003, 39-96 (the rest of this book is recommended for those interested in international conflict and peacebuilding)

3. Philosophies for conflict handling and dispute processing
one class (September 23)

Required readings:

- ▶ Morris, Catherine. *The Good Negotiator: Negotiation Theory, Processes and Skills for Lawyers*. Negotiation workshop manual. Victoria: Catherine Morris, 2009, 3-9 (6 pages)
- ▶ Fiss, Owen, “Against Settlement” (1983) 93 *Yale Law Journal* 1073-90 (18 pages) (or read the excerpt in Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008, Chapter 11, 279-90 (11 pages).
- ▶ Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008, chapter 5, 6 (70 pages).
- ▶ OPTIONAL: David Luban, “Settlements and the Erosion of the Public Realm.” (1995) 83 *Georgetown Law Journal* 2619-662. (43 pages)
<http://www.heinonline.org.ezproxy.library.uvic.ca/HOL/Page?handle=hein.journals/glj83&id=1&size=2&collection=journals&index=journals/glj> (Netlink ID required)
- ▶ OPTIONAL: Menkel-Meadow, Carrie. “Whose Dispute Is It Anyway: A Philosophical and Democratic Defense of Settlement (In Some Cases).” (1995) 83 *Georgetown Law Journal* 2663-97. (34 pages)
<http://www.heinonline.org.ezproxy.library.uvic.ca/HOL/Page?handle=hein.journals/glj83&id=1&size=2&collection=journals&index=journals/glj> (Netlink ID required)

5. Negotiation theory, processes, skills and ethics
Three classes (September 30, October 7, October 14)

Required readings:

- ▶ Morris, Catherine. *The Good Negotiator: Negotiation Theory, Processes and Skills for Lawyers*. Negotiation workshop manual. Victoria: Catherine Morris, 2009, chapters 2, 3, 4, 5. (117 pages)
- ▶ Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008, chapter 3, 4 (58 pages).
- ▶ Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008, chapter 7, 8 (59 pages).
- ▶ David Luban, “The Ethics of Wrongful Obedience,” in Deborah Rhode, ed. *Ethics*

in Practice: Lawyers' Roles, Responsibilities and Regulation (Oxford: Oxford University Press, 2000), 94-120 (article to be placed on reserve) (26 pages)

- ▶ Bok, Sissela. "Truthfulness, Deceit, and Trust." In *What's Fair? Ethics for Negotiators*, edited by Carrie Menkel-Meadow, and Michael Wheeler, 79-90. San Francisco: Wiley, 2004. (Book on reserve) (11 pages)
- ▶ Lax and Sebenius, "Three Ethical Issues in Negotiation," *Negotiation Journal*, (1986) p 363-370. (Available online - UVic netlink ID required <http://www.springerlink.com.ezproxy.library.uvic.ca/content/102591/>) (7 pages)
- ▶ Macfarlane, Julie. *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases*. Ottawa: Family, Children and Youth Section, Department of Justice Canada. Available, http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/index.html#01
- ▶ OPTIONAL: Druckman, Daniel. "Negotiation" In *Conflict: From Analysis to Intervention*, edited by Sandra Cheldelin, Daniel Druckman, and Larissa Fast, 252-269. New York, London: Continuum Books, 2003.

4. **Negotiation: Power, emotions, culture, gender** *two classes (October 21, 28)*

Required readings:

- ▶ Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008, Chapters, 6-9 (139-274). (137 pages)
- ▶ Rubin, Jeffrey, Z. and Frank E.A. Sander, "Culture, Negotiation, and the Eye of the Beholder," (1991) (3) *Negotiation Journal* 249-254, available at <http://www3.interscience.wiley.com.ezproxy.library.uvic.ca/cgi-bin/fulltext/119993651/PDFSTART> (UVic Netlink ID required). (5 pages)
- ▶ Salacuse, Jeswald W. "Ten Ways that Culture Affects Negotiating Style: Some Survey Results." (1998) (3) *Negotiation Journal* 221-40 available at <http://www3.interscience.wiley.com.ezproxy.library.uvic.ca/cgi-bin/fulltext/119993651/PDFSTART> (UVic Netlink ID required). (18 pages)

6. **Mediation** *two classes (November 4, 18)*

Required readings:

- ▶ Cheldelin, Sandra. "Mediation and Arbitration." In *Conflict: From Analysis to Intervention*, edited by Sandra Cheldelin, Daniel Druckman, and Larissa Fast, 280-300. New York, London: Continuum Books, 2003. (Book to be placed on reserve)(20 pages)
- ▶ Moore, Christopher W. "How Mediation Works," In *The mediation process : practical strategies for resolving conflict*. 3rd ed. San Francisco : Jossey-Bass, 2003 (41-77). The rest of this book is recommended reading for those interested in

mediation. (Book to be placed on reserve) (36 pages)

- ▶ Grillo, Tina, "Mediation Alternative: Process Dangers for Women." (1991) 100 (6) *Yale Law Journal* 1545-1610, available at <http://heinonline.org.ezproxy.library.uvic.ca/HOL/Page?handle=hein.journals/ylr100&id=1&size=2&collection=journals&index=journals/ylr> (UVic Netlink ID required) (65 pages)
- ▶ Waldman, Ellen A. "Identifying the Role of Social Norms in Mediation: A Multiple Model Approach," (1997) *48 Hastings Law Journal* 703-769, available at <http://heinonline.org.ezproxy.library.uvic.ca/HOL/Page?handle=hein.journals/hastlj48&id=1&size=2&collection=journals&index=journals/hastlj> (UVic netlink ID required) (63 pages)
- ▶ Morris, Catherine, "The Trusted Mediator: Ethics and Interaction in Mediation," in *Rethinking Disputes: The Mediation Alternative* (York, ON: Emond Montgomery and London, UK: Cavendish Publishing), 301-347 (book on reserve) (46 pages)

**7. ADR initiatives in the justice system
one class (November 25)**

- Civil justice initiatives
- Judicial dispute resolution

Readings:

- ▶ Julie Macfarlane. *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Vancouver: UBC Press, 2008, Chapter 9 (22 pages)
- ▶ Colleen Hanycz, Trevor Farrow, Frederick Zemans, eds. *The Theory and Practice of Representative Negotiation*. Toronto: Emond Montgomery Publications, 2008, Chapter 11, 275-316 (41 pages).
- ▶ Galanter, Marc. "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts." (2004) 1 (3) *Journal of Empirical Legal Studies* 459-570, available at <http://www3.interscience.wiley.com.ezproxy.library.uvic.ca/cgi-bin/fulltext/118821215/HTMLSTART> (UVic netlink ID required). (111 pages; please skim; read sections of interest)

**8. ADR beyond borders and beyond ADR
one class (December 2) if there is time**

- dispute resolution and international legal development
- nonviolent conflict
- ▶ readings to be assigned.

Research topic ideas
(please feel free to propose other topic ideas)

Aboriginal perspectives on dispute resolution

Abuse and mediation

Case study analysis of the design of a specific dispute resolution process or system within a public agency

Case study/conflict analysis of a specific conflict with public dimensions

Child protection mediation

Collaborative law practice

Community dispute resolution centres (neighbourhood justice centres)

Critical race theory and dispute resolution

Critical analysis of communication skills for dispute resolution

Cultural or ethical diversity: dilemmas for mediation policy or practice

Dispute resolution mechanisms in in a trade agreement, e.g. NAFTA

Elder abuse and mediation

Ethics in mediation

Ethics in negotiation

Feminist legal theory and dispute resolution

Freedom of Information and Privacy: the role of dispute resolution

Gender and negotiation or mediation

The history of mediation in Canada

The history of arbitration in Canada

Mandatory mediation

Harassment and dispute resolution

Human rights and dispute resolution

Identifying and addressing power imbalances in negotiation, mediation or adjudicative dispute resolution

Ideologies of dispute resolution

Impartiality and neutrality in dispute resolution

Institutionalization of ADR: prospects and problems

Mandatory mediation

Mandatory mediation for family disputes

Med-arb processes: prospects and problems?

Dispute Resolution and abuse compensation, eg. Residential schools

Mediation in administrative tribunals

The ombudsman's role in dispute resolution

Online dispute resolution

Power, conflict and dispute resolution

Qualifications for mediation

Regulation of lawyers and ADR

Resolution of workplace disputes: policies, processes and practices

The role and impact of religious perspectives in the dispute resolution movement

The role of culture in conflict and conflict resolution

The role of the judiciary in dispute resolution

The role of lawyers in mediation

The role of counselors in mediation

Should mediators be licensed or certified?

Victim-offender mediation