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MEDIATION
**The Roles of Advocate
and Neutral**

*Third
Edition*



Wolters Kluwer

Mediation The Roles of Advocate and Neutral

Third Edition

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*To my wife, Helaine, who has taught me how much dispute resolution
depends on the learning of psychology and the
art of understanding people*

—D.G.

*To my children, Ross, Lisa, and Rachel, who taught me the necessity
of mediation*

—J.F.

PREFACE

This book is based on three key assumptions: First, to represent clients effectively, the next generation of lawyers must be able to mediate effectively. Second, new lawyers are much more likely to encounter mediation as advocates or advisers than as professional neutrals. Finally, textbooks should be interesting to read, bring together the best writing on the process, match well with video, and support interactive teaching.

Our book has a different emphasis than some other texts on mediation. It focuses on *legal* mediation—substantial disputes involving legal claims, in which lawyers are likely to be engaged. It also looks at mediation from the perspective of a lawyer representing a client as well as the viewpoint of a mediator dealing with conflict.

This book uses examples drawn from actual disputes to illustrate the readings and pique students' interest. The introductory chapter on mediation, for example, features the comments of practicing lawyers about how they use the process in a variety of settings. It also includes accounts of how two high-profile disputes were mediated, one involving a student death at a university and the other a major antitrust case. The readings on mediation techniques and about ethical issues are also interspersed with provocative examples drawn from actual practice.

The book includes questions designed to provoke critical thinking about the readings and stimulate class discussion. The text is practical, while grounded in theory, and lawyer-focused but enriched by interdisciplinary knowledge. Accompanying role-plays allow students to apply concepts they have read about and bring the text to life. These role-plays again center largely on the types of disputes in which students are likely to find themselves as practicing lawyers—cases with significant legal claims, as opposed to neighborhood or personal conflicts. The Web site contains a comprehensive bibliography to give readers access to writings by scholars in the field.

This is the first mediation book to include video as an integral part of the teaching materials. The Web site provides students with professionally edited video excerpts drawn from the authors' own work and other sources. Instructors have access to additional video and other materials from a password-protected site they can use to enhance their teaching. The videos show experienced lawyers and neutrals performing in some of the same role-plays featured in the teaching materials, allowing students to see how experienced professionals deal with the challenges they have just faced.

We begin the book with an overview of the disputing universe. It shows that actual legal disputes, unlike the appellate cases that dominate many law school texts, are not neatly packaged, but instead arise as aspects of a near-endless universe of human conflict. Because mediation is a process of assisted negotiation, we next explain the basic concepts of bargaining, analyze choices of style, and present a framework for effective negotiation. Part I of the book concludes with a chapter devoted to the strategic, cognitive, and emotional barriers that often make settlement difficult.

Part II, on mediation technique, begins with examples of mediation in action and goes on to describe styles of commercial mediation that lawyers are likely to encounter, as well as all-caucus and no-caucus approaches. We next examine the process itself in depth, focusing on the methods mediators use to deal with process, emotional/cognitive, and merits-based barriers.

Perhaps the most practical section of the book is Part III, which focuses on how lawyers can represent clients in mediation. This unit is based on our experience conducting commercial and family mediations. Contrary to the image presented in some texts, we begin from the premise that legal mediators commonly do in fact exercise “power.” We treat this as a challenge and an opportunity for lawyers, who can enhance their bargaining effectiveness by drawing on a neutral’s influence. We show how good lawyers can become active participants in mediation, enlisting mediators to overcome barriers to settlement and achieve their clients’ goals.

In Part IV we examine how mediation is applied in different settings, ranging from divorce cases to employment, high tech, and international disputes. We also analyze policy issues, including the impact of mediation on the development of the law and its use in situations where a disputant may be disadvantaged by culture, gender, or spousal violence. A separate chapter delves into ethical issues, presenting situations in which the profession’s model standards come into conflict with each other. We conclude with a look at how mediation may evolve in the future.

This third edition follows the organization of earlier editions. We have updated our narrative and included excerpts from recent writings. We also take advantage of students’ preference for electronic and video formats: Items that have traditionally gone into a paper appendix and bibliography and list of references now appear on the book’s Web site. This makes the book more compact without sacrificing depth, allows readers to download rules and laws for discussion or study, and permits us to update the book as new rules are promulgated. A new feature in the third edition is video of mediation that can be used in teaching.

A note about form: In order to focus discussion and conserve space, we have substantially edited the readings and have deleted most footnotes, references, and case citations. Deletions of material are shown by three dots, but omitted footnotes and other references are not indicated. The footnotes we have retained in excerpts carry their original numbers, while our own footnotes appear with either asterisks or sequential numbering, as appropriate.

This book is the culmination of our combined experience teaching, practicing, and shaping dispute resolution in legal contexts. Although formal acknowledgments follow, we are grateful to the students and lawyers we have had the pleasure of teaching and from whom we have learned a great deal.

January 2016

D.G.
J.F.

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This mediation book evolved from our comprehensive coursebook, *Resolving Disputes: Theory, Practice, and Law*, which we wrote with Lisa Kloppenberg and Thomas Stipanowich. This edition has grown to become a text of its own, but it would not exist without Lisa and Tom's collaboration in creating the survey text. We are grateful for their continuing encouragement and friendship. We benefited from their enthusiasm for this project, and we look forward to partnering with them in the future.

We are thankful for the support and assistance we have each received from the staffs and librarian of the law schools at Suffolk University and the University of San Francisco. Special thanks go to the anonymous reviewers, whose comments on the draft text were insightful and very helpful in refining the contents of this book. We are most grateful to the students and lawyers with whom we have trained and worked in mediation. They have inspired us and guided what we have selected here to present to the next generation of lawyers.

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Mediation

SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxiii</i>
PART I: Introduction	1
Chapter 1: The Origins of Disputes	3
Chapter 2: Negotiator Styles	13
Chapter 3: Negotiation—Step by Step	27
Chapter 4: Barriers to Settlement	51
PART II: The Mediation Process	71
Chapter 5: An Overview of Mediation	73
Chapter 6: Processes of Mediation	101
Chapter 7: Process Skills	123
Chapter 8: Emotional Issues and Cognitive Forces	145
Chapter 9: Merits-Based Barriers	167
PART III: The Advocate's Role	193
Chapter 10: Representing Clients: Preparation	195
Chapter 11: Representing Clients: During the Process	223
PART IV: Specialized Topics	249
Chapter 12: Specific Applications	251
Chapter 13: Court-Connected Mediation and Policy Concerns	291
Chapter 14: The Law of Mediation	325
Chapter 15: Ethical Issues for Advocates and Mediators	363
Chapter 16: Mixed and Changing Roles	381
<i>Appendix</i>	<i>389</i>
<i>Table of Cases</i>	<i>391</i>
<i>Index</i>	<i>393</i>

CONTENTS

<i>Preface</i>	xxi
<i>Acknowledgments</i>	xxiii

PART I

INTRODUCTION	1
--------------	---

CHAPTER 1	
THE ORIGINS OF DISPUTES	3

A. The Nature of Disputing in America	3
B. How Disputes Arise	5
<i>Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society</i> —Marc S. Galanter	5
C. The Spectrum of Dispute Resolution Options	9
D. Conclusion	11

CHAPTER 2	
NEGOTIATOR STYLES	13

A. Competitive Approach	15
<i>A Primer on Competitive Bargaining</i> —Gary Goodpaster	15
B. Cooperative Approach	17
C. The Tension Between Creating Value and Claiming Value	19
<i>The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions</i> —Charles B. Craver	19
D. The Special Problem of Adversarial Bargainers	21
E. Choosing an Effective Approach	22
<i>"I See a Pattern Here and the Pattern Is You": Personality and Dispute Resolution</i> —Sheila Heen & John Richardson	23
F. Cooperation Versus Competitiveness—Who Decides?	25

CHAPTER 3	
NEGOTIATION—STEP BY STEP	27

A. Preparing to Negotiate	28
1. Identifying Alternatives	29

2. Setting Goals	30
<i>Bargaining for Advantage: Negotiation Strategies for Reasonable People</i> —G. Richard Shell	30
3. A Preparation Checklist	33
B. Initial Interaction	35
C. Exchanging Information	36
<i>Negotiation: Theory and Practice</i> —Melissa L. Nelken	37
D. Bargaining	39
1. First Offers	39
2. Managing Concessions	40
3. Value-Creating Trades and Brainstorming	41
<i>Beyond Winning: Negotiating to Create Value in Deals and Disputes</i> —Robert H. Mnookin, Scott R. Peppet, & Andrew S. Tulumello	42
4. Dealing with Adversarial Bargainers	44
E. Moving Toward Closure	45
1. Planning for Closure	46
<i>Getting to YES</i> —Roger Fisher, William Ury, and Bruce Patton	46
2. Splitting the Difference and Dealing with an Impasse	47
<i>Bargaining for Advantage: Negotiation Strategies for Reasonable People</i> —G. Richard Shell	47
F. Finalizing an Agreement	50

CHAPTER 4

BARRIERS TO SETTLEMENT

A. Strategic and Principal-Agent Barriers	51
<i>Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict</i> —Robert H. Mnookin	51
B. Cognitive Barriers and the Role of Perceptions	55
1. Forces That Affect the Ability to Assess a Legal Case	56
a. Selective Perception	57
b. Confirmation Bias	57
c. Anchoring	58
d. Overoptimism	58
e. Judgmental Overconfidence	58
f. Endowment Effect	59
2. Forces That Affect Decisions About Bargaining	59
a. Attribution Bias	60
b. Reactive Devaluation	60
c. Loss Aversion	61
C. The Impact of Fairness	62
D. The Role of Emotions	64
1. The Effects of Grief and Loss	64

<i>Working with Loss and Grief: Theoretical, Practical, and Personal Implications for Elder and Adult Family Mediators— Dana L. Curtis</i>	65
2. Attacks on Identity	69

PART II

THE MEDIATION PROCESS 71

CHAPTER 5 AN OVERVIEW OF MEDIATION 73

A. Introduction	73
1. The Process of Mediation	73
a. What Is Mediation?	73
b. What Do Mediators Do?	74
c. What Is the Structure of Mediation?	74
2. The Value of Mediation	76
a. Viewpoints of Litigators	76
b. Business Perspectives	78
c. Is It Right for Every Dispute? Is It Fair?	80
3. Examples of Mediation in Action	81
a. Death of a Student	81
b. United States v. Microsoft Corporation	84
<i>Unfinished Business: Another Look at the Microsoft Mediation: Lessons for the Civil Litigator—James Laflin & Robert Werth</i>	84
<i>How We Mediated the Microsoft Case—Eric Green & Jonathan Marks</i>	86
c. Mediating as an Advocate	87
4. The Evolution of Legal Mediation	88
B. Goals and Mediator Styles	89
1. Goals for the Process	89
a. Resolve a Legal Claim on the Best Possible Monetary Terms	90
b. Develop a Broad, Interest-Based Resolution	91
c. Repair the Parties' Relationship	91
d. Change the Parties' Perspectives	92
e. Choices Among Goals	92
2. Mediator Styles	94
a. Classifying Styles	94
<i>Retiring and Replacing the Grid of Mediator Orientations—Leonard L. Riskin</i>	94
b. Do Mediators Have a Single Style?	97
3. Is There More to Mediation Than Technique?	98
<i>Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation—Daniel Bowling & David Hoffman</i>	98