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MEDIATION
The Roles of
Advocate and Neutral

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Mediation **The Roles of Advocate and Neutral**

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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.

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

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 advisors than as professional neutrals. Finally, textbooks should be interesting to read, bring together the latest and best writing on the process, and lend themselves to interactive teaching.

Our book, therefore, has a different emphasis from most other texts on mediation. It focuses on *legal* mediation — substantial disputes involving legal claims, in which the disputants are likely to hire attorneys. It also looks at mediation primarily from the perspective of a lawyer representing a client, rather than from the viewpoint of a mediator or a party.

This book includes examples drawn from actual disputes to illustrate the readings and pique students' interest. The introductory chapter in Part II, for example, features the comments of practicing lawyers on how they use mediation in a variety of settings. It also includes accounts of how two high-profile disputes were mediated, one involving a student death and the other the Microsoft antitrust case. The readings on mediation techniques and about ethical issues are also interspersed with examples from 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 the readings and bring the text material 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 quarrels or purely personal conflicts. There is also a comprehensive bibliography to give readers access to a variety of writings by scholars in the field.

This is the first mediation book to include video as an integral part of the teaching materials. Instructors receive a two-hour "Teaching DVD" that contains eighteen professionally filmed video excerpts. The selections are drawn from the authors' own work, as well as from leading mediation videos. The excerpts show experienced lawyers and neutrals performing in some of the same role-plays featured in the teaching materials, which allows students to see how experienced professionals deal with the same challenges that they face.

We begin the book with an overview of the disputing universe. It shows that actual legal disputes, unlike the appellate cases that characterize first-year texts, are not preordained or neatly packaged. Instead, they arise as aspects of a near-endless universe of human conflict. Because mediation is a process of assisted negotiation, we next provide readings that 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, creating an intellectual backdrop for our exploration of how mediation can assist the settlement process.

Part II, on mediation technique, begins with examples of mediation in action, then goes on to describe the principal styles of commercial mediation that lawyers are likely to encounter, as well as no-caucus and transformative approaches. We then examine the mediation process itself in depth, covering both traditional and alternative models and focusing on the methods mediators use to deal with process, emotional, 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 the authors' extensive experience in conducting commercial and family mediations. Contrary to the image presented in some texts, we begin from the premise that commercial mediators commonly do in fact exercise "power" in legal mediation. We argue that this phenomenon presents both a challenge and an opportunity for lawyers, since they can enhance their bargaining effectiveness by drawing on their neutral's influence. We describe, again with numerous case examples, how good lawyers can become active participants in mediation, enlisting mediators to overcome common barriers to settlement and achieve a client's goals.

In Part IV we analyze policy issues in mediation, including its impact on the development of the law and its use in situations where a disputant may be disadvantaged by culture, gender, or spousal violence. We also analyze ethical issues, seeking to bring general principles to life for class discussion by presenting issues encountered by practicing lawyers and neutrals.

Finally, the book examines how mediation is applied in specific contexts, ranging from court-connected programs and family disputes to victim-offender reconciliations and international cases. We conclude with a look at how students entering practice are likely to see mediation evolve.

We have deliberately chosen very recent writings on mediation so that teachers will not need to prepare supplements in order to assign entirely up-to-date material. Readings have been carefully edited to keep the material interesting and lively. We also take advantage of new technology and of students' increasing preference for electronic and video formats. Items that have traditionally gone into a paper appendix now appear on the book's Web site. This makes the book easier to carry without sacrificing depth, allows readers to download specific rules or laws for discussion or study, and permits us to update the book's appendix between editions as new rules and standards are promulgated.

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 decades of teaching, practicing, and shaping dispute resolution in legal contexts. Although our formal acknowledgments follow, we are grateful to the many students and lawyers we have had the pleasure of teaching and from whom we have learned much about what works in a dispute resolution text.

April 2006

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 book 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 librarians of the law schools at Suffolk University and the University of San Francisco, especially from Diane D'Angelo and Richard Buckingham. 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 whom we have trained and worked with 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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1. Seeking Inventive Solutions	60