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The Roles of Advocate and Neutral

Second Edition

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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 best writing on the process, match well with video and support interactive teaching.

Our book has a different emphasis than 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 on mediation, for example, features the comments of practicing lawyers about 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 U.S.-Microsoft antitrust case. The readings on mediation techniques and about ethical issues are also interspersed with provocative situations drawn 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 roleplays allow students to apply concepts they have read about and bring the text material to life. These roleplays 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 personal conflicts with no legal dimension. There is also on the Web site 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. Instructors will receive on request a two-hour “Teaching DVD” that contains eighteen professionally filmed video excerpts drawn from the authors' own work and leading mediation videos. The Second Edition adds to these resources with a video, “Skills of a Legal Mediator,” available from the JAMS Foundation on request, which shows the mediation of an international business dispute with a diverse group of disputants and attorneys. The videos show experienced lawyers and neutrals performing in some of the same roleplays featured in the teaching materials, which allows 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 characterize first-year texts, are not 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 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 a 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 styles of commercial mediation that lawyers are likely to encounter, as well as no-caucus approaches. We then examine the mediation process itself in depth, 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 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 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 actual 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 examine specialized topics. Chapter 12 shows how mediation is applied in a variety of different settings and formats, ranging from divorce cases to employment, high tech, and international disputes. We also 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. Chapter 15 delves into ethical issues, presenting situations encountered by practicing lawyers and neutrals in which the profession’s standards, unimpeachable in themselves, come into seemingly irreconcilable conflict. We conclude with a look at how students entering practice are likely to see mediation evolve.

This second edition follows the same organization as the first edition and contains the same core elements. We have updated some of our narrative and included excerpts from the most recent writings on mediation, so that teachers will not need to prepare supplements in order to assign entirely up-to-date material. 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 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 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 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.

ACKNOWLEDGMENTS

This mediation book evolved from our comprehensive coursebook, *Resolving Disputes: Theory, Practice, and Law*, which we wrote with Lisa Kloppenberg and Thomas Stipanowich. This Second 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, 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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