

ADVANCED GUIDE FOR MEDIATORS

LexisNexis Law School Publishing Advisory Board

Paul Caron

Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Bridgette Carr

Clinical Professor of Law
University of Michigan Law School

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland

Professor of Law and Senior Scholar
Elon University School of Law

Carole Goldberg

Jonathan D. Varat Distinguished Professor of Law
UCLA School of Law

Oliver Goodenough

Professor of Law
Vermont Law School

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

ADVANCED GUIDE FOR MEDIATORS

SUSAN NAUSS EXON

*Associate Dean for Faculty Development & Professor of Law
University of La Verne College of Law*



ISBN: 978-0-7698-6278-1 (print)
ISBN: 978-0-3271-8395-2 (eBook)

Library of Congress Cataloging-in-Publication Data

Exon, Susan Nauss, author.
Advanced guide for mediators / By Susan Nauss Exon.
p. cm.
ISBN 978-0-7698-6278-1
1. Dispute resolution (Law)--United States. 2. Mediation--United States. I. Title.
KF9084.E96 2014
347.73'9--dc23
2013049941

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

NOTE TO USERS

To ensure that you are using the latest materials available in this area, please be sure to periodically check the LexisNexis Law School web site for downloadable updates and supplements at www.lexisnexis.com/lawschool.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

Dedication

To

*my mother, JoAnne B. Horstmann, a woman of grace, who has always
believed in me and encouraged me to follow my heart.*

Acknowledgments

I have been blessed with wonderful colleagues, many of whom have become good friends. Some offered suggestions regarding the scope and coverage of this book. Some read earlier drafts of chapters and offered helpful comments. I appreciate those who have shared with me their precious time and expertise as I developed an approach to this book. The following colleagues and friends have been incredibly generous with their time, including: Don Cripe, Charles Doskow, Barrie Roberts, Mel Rubin, Stefanie A. Schmidt, Honorable John Tobin, Ellen Waldman, and Paula Marie Young.

My research assistants were fabulous. Special thanks to Ruthann Elder, who helped me throughout the major writing of the book. Many thanks also to Ana Luz Vazquez, Jordan Cronk, and Alberto Avila.

I am grateful to the University of La Verne College of Law for its support through research stipends and a sabbatical that helped me finish this book. College of Law librarians were immensely helpful in providing supporting research, especially William Ketchum, Reference and Faculty Services Librarian. Of course, my Administrative Assistant, Melinda Davenport, offered exceptional services during most of the years that it took me to write this book.

A big thank you to my colleagues in the ADR field who have engaged in creative discourse, written scholarly works focused on mediation, and contributed many ideas to the mediation field that are incorporated into this book. My heartfelt thanks go to the 20 contributors who wrote commentaries for Chapter 8. Finally, I thank the following authors and publications, which have granted permission to reprint portions of the following copyrighted materials:

- Kristen M. Blankley, *Cyberweek Hypothetical 2012: The Mixed Media Mediation*
- Bill Eddy, *Talking to the Right Brain in Conflict*, Summer 2001, 10 ACRESOLUTION at 16
- Susan Nauss Exon, *The Effects That Mediator Styles Impose on Neutrality and Impartiality Requirements of Mediation*, 42 U. S.F. L. REV. 577 (2008)
- Susan Nauss Exon, *The Misnomer of a Mediation Value: Why All Mediators Cannot Remain Impartial*, 1 Y.B. ARB. & MED. 164 (2009)
- Susan Nauss Exon, *Maximizing Technology to Establish Trust in an Online, Non-visual Environment*, 33 U. LA VERNE L. REV. 27 (2011)
- Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45 (2005)
- Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775 (1999)
- Paula M. Young, *Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems That Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. DISP. RESOL. 721 (2006)
- MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005) — permission granted

Acknowledgments

by the American Bar Association, Association for Conflict Resolution, and the American Arbitration Association

- UNIFORM MEDIATION ACT — permission granted by the Uniform Law Commission
- UNIFORM COLLABORATIVE LAW ACT — permission granted by the Uniform Law Commission

Contributor Biographies

David C. Batson, Senior ADR Specialist of the U.S. Environmental Protection Agency, is a nationally recognized pioneer in the field of alternative dispute resolution. In over 25 years as an ADR professional, he has served parties in matters ranging from complex multi-party hazardous waste conflicts to two-party workplace and regulatory disputes. An experienced meeting facilitator, consultant, and trainer, he has assisted numerous clients with meetings regarding public policy and organizational issues and is an adjunct professor and frequent speaker on the effective use of ADR. Mr. Batson is Chair of the ADR Committee of the ABA Section on Energy, Environment & Resources.

Kristen M. Blankley is an Assistant Professor at the University of Nebraska College of Law, where she teaches on a wide variety of alternative dispute resolution topics, including negotiation, mediation, and arbitration. She is a 2004 graduate of The Ohio State University Moritz College of Law, where she graduated with a Certificate of Dispute Resolution. Since her graduation, she has been active in the field of Alternative Dispute Resolution, and she is also a mediator. Prior to joining the University of Nebraska, Professor Blankley was an attorney with the firm Squire, Sanders LLP (Columbus, Ohio office), where she focused her practice on business litigation.

Professor Blankley also is an active scholar in the field of Alternative Dispute Resolution, publishing on arbitration, mediation, and ethics in alternative dispute resolution issues. She has written on topics including class action arbitrations, judicial review of arbitration awards, mediation ethics, and mediation confidentiality.

Terry Bridges has had 45 years of an active trial practice and has fully transitioned to mediation practice. Mr. Bridges has been actively engaged as a mediator for over 20 years. During that period he has served as the founding director of the Riverside County Bar Association's Dispute Resolution Service Corporation as well as a panelist for the Riverside County Superior Court and Division Two of the Fourth District Court of Appeal. Since 2005 Mr. Bridges has been an active member of the Attorney Settlement Program for the U.S. District Court for the Central District of California. He currently serves on its Advisory Panel. Mr. Bridges has been recognized by many prestigious organizations for his work regarding professionalism, ethics, and civility in the legal profession.

Donald B. Cripe is a retired civil trial lawyer and is a formally trained ADR panelist for the American Arbitration Association, American Health Lawyers Association, and others. He currently serves as a full-time ADR Specialist with between 3000 and 4000 civil and family law mediations completed. Cripe also serves as an Adjunct Law Professor (Mediation) and a Mediation Trainer. He is a supervisor (past and present) of court mediation panels in two counties in California.

Steven Gonzales is a law professor and member of Phoenix School of Law's founding faculty. He teaches Constitutional Law, Alternative Dispute Resolution, and Federal Indian Law. He recently chaired an access to justice session at the *White House Summit on Hispanic Education*. He has served as an accredited NGO representative at the UN Permanent Forum on Indigenous Issues. In 2013 Botswana invited him to speak on ADR at the first conference of labor judges for several African nations. He has appeared over 75 times as an analyst for news media such as the PBS News Hour, National Public Radio, *Time Magazine*, CNN TV and CNN Radio, ABC, CBS, NBC and Fox. He was President of the Arizona Association for Conflict Resolution and was an officer on the American Bar Association Section of Dispute Resolution Council. He is Vice-Chair of the ABA Committee on International Legal Education and has addressed ADR events at Harvard Law School, the London International Court of Arbitration, the Paris Bar Association, South American judges, and taught ADR for seven years in Switzerland.

Michael G. Harrison served as a circuit judge of the 30th Judicial Circuit of Michigan for twenty-five years. He was Chief Judge for twelve years and served by assignment on the Michigan Court of

Contributor Biographies

Appeals on a number of occasions. He was appointed by the Michigan Supreme Court as chair of the Case Flow Management Coordinating Committee and member of the Task Force on Juror Use and Management. He was President of the Michigan Judges' Association and was a faculty member of the Michigan Judicial Institute. Judge Harrison chaired the National Conference of State Trial Judges in 1997-1998. He was recipient of the Judicial Division Award of Judicial Excellence in 2003. He is listed in *Best Lawyers in America* and *Marquis Who's Who in America*. He is Of Counsel with the firm of Foster, Swift, Collins & Smith, P.C. where his area of concentration is Dispute Resolution.

James Heiting is past president of the State Bar of California (2005-2006), member of the State Bar Board of Governors (2002-2006), and past president of the Riverside County Bar Association. Mr. Heiting serves as a judge pro tem in Superior Court, has served as a mediator appointed by the Federal Courts, and continues to have an active civil litigation practice and to serve in the capacity of a privately requested and court appointed arbitrator and mediator in state courts and the California courts of appeal.

Art Hinshaw is the Director of the Lodestar Dispute Resolution Program and a Clinical Professor of Law at the Sandra Day O'Connor College of Law at Arizona State University. Professor Hinshaw has written several articles about alternative dispute resolution, particularly mediation and attorney negotiation ethics. Currently he is a member of the ABA's Standing Committee on Mediator Ethical Guidance, a member of the Arizona Commission on Judicial Conduct, and a regular contributor to *Indisputably: the ADR Prof Blog*.

Fred E. Jandt is currently professor of communication and dean of the Palm Desert Campus of California State University, San Bernardino. He is a mediator, prepares mediators for Court mediation programs in Riverside County, California, and conducts research in mediation. His publications include *Constructive Conflict Management: Asia-Pacific Cases* (with Paul Pedersen, Sage), *Win-Win Negotiating* (Wiley, translated into seven languages), *Alternative Dispute Resolution for Paralegals* (Anderson), and *Intercultural Communication* (Wiley). He was named the university's outstanding professor in 2003.

Kimberlee K. Kovach has been a leader and visionary in the modern mediation and alternative dispute resolution movement for over 35 years. She is a leading teacher, trainer, scholar and practitioner in the field of mediation and other dispute resolution processes. Kovach has taught a variety of ADR courses in legal education for over twenty years, and is the author of two books on mediation, and has published numerous law review articles, book chapters as well as short articles on a variety of ADR topics. Kovach has lectured extensively throughout the United States and abroad, and was recently honored with the prestigious Lifetime Achievement Award by the International Academy of Mediators in recognition of her long time work in the field of mediation.

John Lande is the Isidor Loeb Professor at the University of Missouri School of Law and former director of its LLM Program in Dispute Resolution. He received his J.D. from Hastings College of Law and Ph.D in sociology from the University of Wisconsin-Madison. He began mediating professionally in 1982 in California. His work focuses on various aspects of dispute systems design, including publications analyzing how lawyering and mediation practices transform each other, business lawyers' and executives' opinions about litigation and ADR, designing court-connected mediation programs, improving the quality of mediation practice, the "vanishing trial," and planned early negotiation. The ABA recently published his book, *Lawyering with Planned Early Negotiation: How You Can Get Good Results for Clients and Make Money*.

Priscilla W. Lloyd is an attorney and mediator based in Orange County, California. She is a graduate of Temple University and Temple University Beasley School of Law. Ms. Lloyd holds a Certificate in Dispute Resolution from Pepperdine University's Straus Institute and is an LLM candidate at that institution. Ms. Lloyd has served as a presenter/panelist for the Ethics Committee of the ABA's Section of Dispute Resolution.

As an attorney, **Richard W. S. Pershing** came to believe in the power of mediation when two adverse

Contributor Biographies

clients had agreed to have him mediate a matter. Office staff accidentally seated the two clients in the same room. Hoping to avert catastrophe, Mr. Pershing rushed in and found the parties had already, in just a matter of minutes, worked out the details for a settlement! Mr. Pershing is a partner in Reynolds Jensen & Swan LLP and the Director for the Center for Conflict Resolution, Tom and Vi Zapara School of Business, La Sierra University, Riverside, California. His law practice focuses in the areas of estate and business planning, operations and transactions.

Donald R. Philbin, Jr., J.D., M.B.A., LL.M., is an AV-rated attorney-mediator and president of Picture It Settled®, a software company that develops predictive analytics for negotiation based upon deep data from thousands of litigated cases. Don has extensive business and legal experience and mediates individual and class matters in a range of substantive areas. He is an adjunct professor of law, was recognized as the 2011 Outstanding Lawyer in Mediation by the SAN ANTONIO BUSINESS JOURNAL, was one of three Texas mediators listed in the inaugural edition of THE INTERNATIONAL WHO'S WHO OF COMMERCIAL MEDIATION (2011), and is repeatedly listed in The Best Lawyers in America and TEXAS SUPER LAWYERS.

Barrie J. Roberts was the ADR Director for the Riverside County Superior Court in southern California from 2008-2013. She teaches ADR, Negotiation, and *Mediation as a Second Language*® courses she created for international students at UC Berkeley and international LL.M. students at Chapman University School of Law.

Barrie has worked for the King of Torts, Melvin M. Belli, with Legal Services of Northern California, Inc., as a public interest attorney, and with San Francisco's Community Boards as a mediator and trainer. She graduated from UC Berkeley, UC Hastings College of the Law, Sacramento State University (M.A., TESOL) and Pepperdine University School of Law (LL.M., Dispute Resolution).

Peter Robinson is the Managing Director of the Straus Institute for Dispute Resolution and Professor at Pepperdine University School of Law. Professor Robinson's humor, energy and ability to articulate lessons from his mediation experiences have made him a popular lecturer and trainer; he has presented advanced negotiation and mediation skills courses throughout the United States and in more than 15 countries. He has served on the boards of the Christian Conciliation Service, Ventura Center for Dispute Settlement, Dispute Resolution Services of the LACBA, Southern California Mediation Association (SCMA) and California Dispute Resolution Council. He has been recognized as the SCMA Peacemaker of the Year and as a Super Lawyer in Mediation. He may be reached at peter.robinson@pepperdine.edu.

Melvin A. Rubin is a practicing attorney for over 40 years in Florida and an ADR practitioner continuously since 1985 and has trained over 5,000 professionals in ADR. Mr. Rubin has written extensively in the areas of mediator malpractice, ethics, ADR design systems and disaster mediation, including just completing the revision to his chapter for Lexis/Nexis on ADR in their Florida Family encyclopedia.

Mr. Rubin is actively engaged in many organizations, including: past president of the American College of Civil Trial Mediators; a member of the editorial board of the American Journal of Mediation; member on the Florida Supreme Court Mediation and Arbitration Policy and Rules Committee (over 16 years); adjunct professor at the University of Miami Law School (over 11 years); and one of eight of core faculty of the American Institute for Mediation.

Mr. Rubin is located in Coral Gables. His websites are: www.melrubin.com and www.mediationtrainings.com and he can be reached at (305) 446-4630 and mrubin@melrubin.com.

Mark Travis represented public and private sector organizations in employment law and labor relations issues for over 20 years before becoming a full-time neutral. Mark is a Distinguished Fellow in the International Academy of Mediators and also serves as the Director of the Institute for Collaborative Leadership at Lincoln Memorial University. He received his law degree from the University of Louisville and holds a Master of Laws in Dispute Resolution from the Straus Institute for Dispute

Contributor Biographies

Resolution at the Pepperdine University School of Law, where he also teaches employment dispute resolution.

Ruth C. Vance is a Professor of Law at Valparaiso University School of Law, Valparaiso, Indiana, where she teaches Alternative Dispute Resolution, Negotiation, and Mediation. She is Past Chair of the ADR Section of the Indiana State Bar Association and is a member of the Ethics Committee of the American Bar Association's Dispute Resolution Section. Professor Vance has been an assistant trainer in basic civil and family mediation forty-hour courses and has served as a mediator under an appointment from the Indiana Department of Education, Division of Exceptional Learners, to mediate disputes between school corporations and parents of special needs children. She is an arbitrator for expedited cases for United States Steel Company and the Steelworkers Union.

Ellen Waldman has been active in the fields of mediation and medical ethics for over two decades. In the area of dispute resolution, she writes, trains, consults and mediates in a broad range of cases, including end-of-life in the health-care context. The chair of the International Mediation Institute's ethics committee, co-chair of the American Bar Association Dispute Resolution Section's committee on health care, and task-force member for the California judicial council's working-group on training requirements for court-connected mediators, Waldman has been deeply involved in policy questions relating to the qualification and ethics training of mediators.

A mediator for both community centers and superior courts in California and consultant for profit and non-profit healthcare institutions, Waldman founded and directs the Thomas Jefferson School of Law Mediation Program, where she is also a full-time faculty member. She has published more than 25 articles on numerous dispute resolution topics and has recently edited a book entitled *Mediation Ethics: Cases and Commentaries*.

About the Author

Susan Nauss Exon is Associate Dean for Faculty Development and Professor of Law at the University of La Verne College of Law, where she has been on the faculty since 1999. She teaches in the areas of Alternative Dispute Resolution, Mediation, Mediation Ethics, Negotiation, Civil Procedure, and Professional Responsibility. Prior to coming to La Verne Law, she served as the Director of Law and Public Policy at the University of California, Riverside Extension, and practiced law for a prominent southern California law firm. Susan has mediated all types of cases since the 1990s, and currently serves on mediator panels for the Riverside County Superior Court and for the Riverside County Bar Association's Dispute Resolution Service Corporation.

Susan speaks frequently on ethical and ADR topics and has been a featured speaker for the PBS television show, *Contemporary Legal Issues*. She has published extensively in the areas of mediation, mediation ethics, and Civil Procedure, including several articles pertaining to cyberjurisdiction wherein she proposed the creation of an international cybercourt that includes a dispute resolution component for online disputes. Susan serves on the Committee on Mediator Ethical Guidance for the American Bar Association Section of Dispute Resolution and is a past co-chair of the Section's Ethics Committee. She can be reached at snxon@laverne.edu.

Preface

Mediation is a wonderfully flexible dispute resolution process. It offers a safe haven for people in conflict who use a third-party neutral as they seek to resolve differences on their own terms. Many texts exist to train mediators. These texts offer guidance regarding the role of mediators, typical stages of mediation, basic negotiation theory, ethics, and communication skills. Mediators who have been around the block once or twice need more sophisticated topics as they continually strive to improve their skills. Hence, ideas for an advanced mediation text began to be conceptualized. When I started writing this book, no other advanced mediation text existed; therefore, I felt empowered to select those topics that seemed important for mediators.

Chapter 1 provides an overview of mediation, intended to confirm basic knowledge and skills taught in beginning mediation training. It is important to reconfirm this basic information to set the foundation upon which to develop the rest of this book.

Chapter 2 emphasizes the importance of mediation preparation. Although this topic is normally taught in basic mediation training by teaching beginning mediators how to prepare themselves for mediation, I focus on preparation from a different perspective. For example, you probably learned the importance of contacting parties or their attorney representatives to glean helpful information so that you can prepare for the mediation session. You may have seen samples of letters of introduction, agreements to mediate, and mediation briefs. Basic mediation training also teaches the dynamics of a room arrangement, whether using a conference room table or soft, comfortable chairs without a table to separate participants. Chapter 2, in contrast, focuses on how a mediator may help parties and their representatives prepare for mediation. Although it includes some of the same basic information about the convening process, it is focused on how that information can be helpful for the parties' preparation. It teaches mediators the critical need for parties to understand the scope and process of mediation. For example, how might one select the proper participants for mediation? Chapter 2 also discusses how mediators can help coach parties and their representatives to prepare for mediation, including an analysis of party expectations, the timing of mediation, preparation of a cost-benefit analysis, and preparation of written materials among other topics.

Many basic mediation trainings discuss some aspect of negotiation, including the difference between distributive and integrative bargaining. Chapter 3 takes basic negotiation information and expands upon it. In particular, the chapter highlights the importance of approaching negotiation in a systematic, objective manner. Negotiation theories, strategies and tactics are covered in more detail than a typical mediation training so that a mediator can recognize maneuvers that a mediation participant may display. Likewise, psychological and cognitive barriers to negotiation are covered so that a mediator may recognize certain dynamics and help elude impasse as a result. Finally, Chapter 3 provides depth to topics that usually are given cursory, if any, coverage during basic mediation training. These topics include gender, race, culture, and religion.

Several chapters cover topics in detail that might have been mentioned in basic mediation training, but not actually taught. Chapter 4 presents a thorough discussion of apology and forgiveness and instructs mediators how to coach participants to make effective, genuine use

Preface

of these concepts during mediation. Chapter 5 presents the topic of trust. You will see that trust is so important to productive communication during mediation. If people trust one another, including a mediator, they are more likely to open up and discuss sensitive information in a candid dialogue. Chapter 5 starts by providing basic information about definitions of trust and types of trust, and then discusses six principles that mediators can rely on to engender and maintain trust with mediation participants.

Most basic mediation courses spend an hour or two covering mediation ethics. Students learn basic values found in the Model Standards of Conduct for Mediators (Model Standards) and related state counterparts. This book addresses mediation ethics in two chapters. Chapter 6 presents a discussion of key mediation values — those individual standards found within a set of mediation standards of conduct. The presentation of these key mediation values highlights the tension that many may create when a mediator seeks to comply with them concurrently. Hence, the mediator’s dilemma is presented; how can a mediator serve competently and ethically when adherence to one mediation value may impinge on another. Chapter 7 addresses advanced ethical issues. These include mediator manipulation, informed consent, and good faith participation by mediation participants.

Chapter 8 is different from all other chapters. It includes a series of vignettes that pose tactical dilemmas for mediators. Guest contributors respond to each vignette, showing the diversity in which mediators perceive their role.

Chapters 9 and 10 originally started out as one chapter. Because of the extensive coverage, however, I created two chapters: Chapter 9 regarding mediator malpractice and Chapter 10, quality control for the mediation field. Chapter 9 is one of the few chapters that includes excerpts of relevant court cases to highlight possible legal theories and proof problems when seeking to sue mediators for professional negligence. Chapter 9 also presents a thorough discussion of both preventative and curative conduct that mediators may take to avoid liability yet provide a competent service for the public at large. Whereas Chapter 9 focuses on individual mediator conduct, Chapter 10 focuses on the mediation field as a whole. Chapter 10 presents an overview of existing mediation regulation and then recommends ways to strive for best practices.

Online dispute resolution (ODR) has been a hot topic since the beginning of the twenty-first century; therefore, it deserves its own chapter. Chapter 11 presents a cursory discussion of the definitions of ODR and its historical development. ODR relates to any type of dispute resolution that is not in a face-to-face physical environment. Online mediation, or what I refer to as “virtual mediation,” is part of ODR. Chapter 11 discusses various ODR systems and platforms, concentrating on virtual mediation. The chapter concludes with a discussion of ethics and ODR, highlighting the differences between mediation ethics as we know them and ethical issues inherent in an online practice.

Finally, Chapter 12 addresses the progressive nature of mediation. It starts by presenting some hot topics that currently reflect upon mediation. Chapter 12 ends with a discussion of thoughts and predictions for the future of mediation.

This book also provides helpful resources. The Appendices include sample forms and several checklists. They also include reprints of the Model Standards of Conduct and other helpful mediation resources.

Table of Contents

Chapter 1	OVERVIEW OF MEDIATION	1
I.	INTRODUCTION	1
II.	SCOPE AND COVERAGE OF THIS BOOK	1
III.	KEY ASPECTS OF MEDIATION	2
A.	Overview	2
B.	Comparison with Adversarial Dispute Resolution Processes	3
1.	Informal, Voluntary, and Consensual Process	3
2.	Party Autonomy	3
3.	Confidential Dispute Resolution Process	4
4.	Cost-Effective, Expedious Process	4
5.	Positive Aspects of Communication	5
6.	Ability to Preserve Relationships and Focus on the Future	5
IV.	THE STAGES IN THE MEDIATION PROCESS: C O D E	6
A.	Convening and Preparation	6
B.	Opening	7
C.	Discussion	7
1.	Information Exchange	8
2.	Identification of Issues	8
3.	Negotiation	8
4.	Use of Caucuses	8
5.	Getting Past Impasse	9
D.	Ending	10
1.	Commitment and Writing the Agreement	10
2.	No Settlement	10
E.	Other Mediation Models	10
V.	THE ROLE OF THE MEDIATOR	11
A.	Guardian of the Process	11
B.	Specific Functions of the Mediator	12
C.	Mediator Styles, Orientations, and Approaches	14
	Susan Nauss Exon, <i>The Effects That Mediator Styles Impose on</i>	
	<i>Neutrality and Impartiality Requirements of Mediation</i>	14
VI.	THE IMPORTANCE OF COMMUNICATION	20
A.	Verbal Communication	21
1.	Questions	21
2.	Listening	22
a.	Types of Listening	22
b.	Active and Interactive Listening Skills	23

Table of Contents

c.	The Importance of Listening	23
B.	Nonverbal Communication	23
C.	Conflict Styles	24
VII.	CONCLUSION	26
	Notes and Questions	26
Chapter 2	THE IMPORTANCE OF MEDIATION PREPARATION . . .	29
I.	INTRODUCTION	29
II.	UNDERSTANDING THE MEDIATION PROCESS	30
A.	Nature of Mediation	30
B.	Deciding Whether Mediation Is the Right Dispute Resolution Process for a Particular Dispute	31
III.	SELECTING THE PROPER PARTIES	32
A.	Selecting the Most Effective Mediator	32
B.	Selecting the Most Effective Legal Counsel	34
C.	Selecting the Most Effective Client	34
IV.	EDUCATING AND PREPARING THE CLIENT	35
A.	Educating the Client	35
B.	Preparing with the Client	36
1.	Analysis of Client Expectations	36
2.	Cost-Benefit Analysis	37
a.	Intuitive Case Worth Method	37
b.	“Rule-of-Thumb” Valuation	38
c.	Sindell Formula	38
d.	Decision Tree Analysis	39
3.	Consideration of Interests for Creative Problem-Solving	41
4.	Timing of Mediation	41
5.	Formal or Informal Discovery	41
6.	Strategy for Case Presentation	41
7.	The Importance of Appearance	42
V.	PREPARING WRITTEN MATERIALS	42
A.	Mediation Brief or Statement	42
B.	Copies of Relevant Documents	43
C.	Exhibits and Charts	43
D.	Videos	44
VI.	CONCLUSION	44
	Notes and Questions	45

Table of Contents

Chapter 3	ADVANCED NEGOTIATION SKILLS FOR MEDIATORS	47
<hr/>		
I.	INTRODUCTION	47
II.	A SYSTEMATIC, OBJECTIVE APPROACH TO NEGOTIATION	48
A.	The Effect That Emotions Have on Negotiation	48
B.	The Mediator’s Role with Emotion	49
C.	Five Core Concerns That Underlie Emotions	50
	Notes and Questions	52
III.	NEGOTIATION THEORIES, STRATEGIES, AND TACTICS	52
A.	Distributive Negotiation and Corresponding Strategies	53
B.	Integrative Negotiation and Corresponding Strategies	54
C.	Tactics	55
1.	Highball/Lowball	56
2.	Lack of Authority or Limited Authority	56
3.	Intimidation	57
4.	Aggressive Behavior	57
5.	Boulwareism/Best Offer First Bargaining	58
6.	Good Cop/Bad Cop (Mutt and Jeff)	58
7.	Br’er Rabbit-like Reverse Psychology	59
8.	False Demands	59
9.	The Nibble	60
D.	The Role of Mediators in Negotiation	60
	Notes and Questions	61
IV.	PSYCHOLOGICAL AND COGNITIVE BARRIERS TO NEGOTIATION	62
A.	Framing	62
B.	Risk Aversion	64
C.	Anchoring and Availability	65
D.	Fundamental Attribution Error	65
E.	Positive Illusions	67
F.	Imperfect Information	68
G.	Perspective Biases	68
H.	Reactive Devaluation	68
I.	Endowment Effect	69
J.	Loss Aversion	70
K.	Regret Aversion	70
L.	Reciprocity Norm	71
M.	Influence of Attorney Perspectives on Client Decisions	71
	Notes and Questions	72
V.	SOCIAL ASPECTS OF NEGOTIATION	73
A.	Gender	73

Table of Contents

1.	Gender Differences in Negotiation	74
2.	The Impact of Context and Specific Situations on Gender Differences . . .	76
B.	Culture	78
1.	Common Dimensions that Account for Cultural Differences	79
2.	The Role of the Mediator	84
C.	Race	84
D.	Religion	86
1.	Sources of Religious Identity and Conflict	86
a.	Buddhism	87
b.	Christianity	87
c.	Judaism	88
d.	Islam	89
e.	Hinduism	89
2.	Differing Negotiation Styles	90
3.	Methods to Resolve Disputes Based on Religious Values	91
	Notes and Questions	92
Chapter 4 THE POWER OF APOLOGY AND FORGIVENESS		95
I.	INTRODUCTION	95
II.	THE IMPORTANCE OF APOLOGY AND FORGIVENESS IN MEDIATION	96
III.	APOLOGY	96
A.	The Meaning of an Apology	96
B.	The Legal and Social Effects of an Apology	98
1.	Lawyer’s Involvement Affects Apology	98
2.	Positive Economics of an Apology	100
3.	Importance of Timing of an Apology	100
4.	Ability to Repair a Damaged Relationship	101
5.	The Nature of a Legal Dispute	101
6.	Genuine Personality to Apologize	101
7.	Increased Self-Worth	102
8.	The Effect of Gender	102
9.	Spiritual and Psychological Growth	102
10.	Increased Pay Checks	102
C.	The Methodology of an Effective, Positive Apology	103
1.	Recognition	103
2.	Responsibility	104
3.	Remorsefulness	105
4.	Restitution	105
5.	Repetition	106

Table of Contents

D.	The Mediator’s Role in an Apology	106
	Notes and Questions	107
IV.	FORGIVENESS	109
A.	The Meaning of Forgiveness	109
B.	Three Models of Forgiveness	110
1.	Therapeutic Approach	111
2.	Relational Approach	111
3.	Redemptive Approach	112
C.	Why People Cannot Forgive	113
D.	The Process of Forgiveness	114
1.	Therapeutic Approach	114
2.	Relational Approach	115
3.	Redemptive Approach	116
E.	The Mediator’s Role in Forgiveness	117
	Notes and Questions	118
 Chapter 5		
	IMPORTANCE OF TRUST IN MEDIATION	121
I.	INTRODUCTION	121
II.	TRUST, GENERALLY	122
A.	Definitions of Trust	122
B.	Context in Which Trust Is Measured	123
1.	Individual Disposition to Trust	123
2.	Characteristics that Shape Trustworthy People	124
3.	Types of Trust	125
a.	Calculus-Based Trust	125
b.	Identification-Based Trust	126
c.	Online Trust	126
(1)	Initial Trust	127
(2)	Swift Trust	127
(3)	Felt Trust	127
III.	THE IMPORTANCE OF TRUST IN MEDIATION	128
IV.	SIX KEY PRINCIPLES FOR BUILDING AND MAINTAINING TRUST	128
A.	Introduction	128
B.	Six Key Principles to Promote Trust in Mediation	129
1.	Principle 1: Create Social Presence	130
a.	Media Involving Visual, Non-Verbal Cues	130
b.	Interactivity of Media	131
c.	Warmth Inherent in Social Media	133
2.	Principle 2: Establish Credibility Through Skillful Interaction	134

Table of Contents

a.	Education About the Mediation Process	134
b.	Impartiality	134
c.	Consistency	135
d.	Clarity and Organization	135
e.	Professionalism	136
f.	Transparency	136
g.	Predictable and Prompt Responses	137
3.	Principle 3: Create Positive Experience and Perceptions	138
a.	Model Positive Personal Characteristics	138
b.	Identify Emotion	139
4.	Principle 4: Sustain Mediator Competence	140
5.	Principle 5: Establish Reputation and Credibility Through Marketing . .	141
6.	Principle 6: Use Technology to Promote a Trustworthy Environment . .	143
C.	Summary of the Six Key Principles to Promote Trust in Mediation	145
V.	CONCLUSION	145
	Notes and Questions	146
Chapter 6	MEDIATION ETHICS	149
I.	INTRODUCTION	149
II.	KEY MEDIATION VALUES	152
A.	Party Self-Determination	152
B.	Mediator Impartiality	153
C.	Conflicts of Interest	154
1.	Subject Matter	155
2.	Relationship Issues	155
D.	Mediator Competence	156
E.	Confidentiality	156
1.	Types of Confidentiality	157
a.	Absolute Confidentiality	157
b.	Enumerated Confidentiality	158
c.	Qualified Confidentiality	158
2.	Privilege v. Evidentiary Rule	158
F.	Quality of the Process	159
III.	TENSION BETWEEN MEDIATION VALUES	161
IV.	THE MEDIATOR’S ETHICAL DILEMMA: HOW CAN I DO IT ALL AND DO IT RIGHT?	163
	Susan Nauss Exon, <i>The Misnomer of a Mediation Value: Why All Mediators Cannot Remain Impartial</i>	163
V.	CONCLUSION	170
	Notes and Questions	171

Table of Contents

Chapter 7	ADVANCED ETHICAL ISSUES FOR MEDIATORS	175
I.	INTRODUCTION	175
II.	MEDIATOR MANIPULATION	175
A.	Verbal Communication and Psychological Strategies	176
	Bill Eddy, <i>Talking to the “Right” Brain in Conflict</i>	178
B.	Influences of Smell and Taste	179
C.	Visual Communication	179
	Notes and Questions	182
III.	INFORMED CONSENT	184
A.	Definition of Informed Consent	184
B.	Application of Informed Consent to Mediation	186
C.	Proper Disclosure and Consent Requirements for Informed Consent	187
	Jacqueline M. Nolan-Haley, <i>Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking</i>	187
D.	Tactical Considerations for the Mediator	190
	Lela P. Love & John W. Cooley, <i>The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary</i>	191
	Notes and Questions	195
IV.	GOOD FAITH PARTICIPATION BY MEDIATION PARTICIPANTS	196
A.	Definition of Good Faith	196
B.	Illustrative Court Cases	198
	<i>In re: A.T. Reynolds & Sons, Inc., d/b/a Leisure Time Spring Water, Debtor</i>	198
	Notes and Questions	209
Chapter 8	ADVANCED TACTICAL CONSIDERATIONS AND THE ROLE OF THE MEDIATOR	211
I.	INTRODUCTION	211
II.	ADVANCED TACTICAL CONSIDERATIONS	212
A.	Number of Parties at the Mediation Table	212
	<i>All for One and One for</i>	212
B.	Nonparty Participation in Mediation	216
	<i>Mommy Dearest</i>	216
C.	Lack of Personal Participation by a Party	221
	<i>The Unwilling Defendant</i>	221
D.	Power Balance Between Represented and Non-Represented Parties	226
	<i>How to Save our Little Girl from Goliath</i>	226
E.	Disagreement Between Lawyer and Client Regarding Settlement	234
	<i>The Big Disagreement</i>	234
F.	Mediation Room Set-Up, Including Use of Food and Beverage	240

Table of Contents

	<i>A Contentious Group of Academics</i>	240
G.	Effect of Disparaging Sidebar Remarks about Ethnicity or Religion	246
	<i>The Power of Bigotry</i>	246
H.	Effect of Incorrect Legal Advice by a Lawyer Representative	251
	<i>The Unwilling Lawyer’s Wrong Legal Advice</i>	251
I.	Uncertainty Regarding Settlement Authority of Entity Representative	257
	<i>The Case of the Unknown Mechanic</i>	257
J.	Effect of Lying in Mediated Negotiation	262
	<i>The Deceptive Partner</i>	262
III.	CONCLUSION	269
	Notes and Questions	270

Chapter 9 MEDIATOR MALPRACTICE 273

I.	INTRODUCTION	273
II.	POSSIBLE FORMS OF ACTION	274
A.	Proof Problems	275
1.	Immunity	275
a.	Statutory Immunity for Mediators	276
b.	Common Law Immunity for Mediators	277
	<i>Savoie v. Martin</i>	279
2.	Confidentiality	282
3.	Standard of Care	286
4.	Ascertainable Damages	287
B.	Legal Causes of Action	290
1.	Tort Theories	291
a.	Professional Negligence	291
	<i>Lehrer v. Zwernemann</i>	291
b.	Miscellaneous Torts	293
2.	Contract Theories	295
a.	Breach of Contract	295
b.	Breach of Fiduciary Obligations	296
c.	Miscellaneous Contract Theories	296
3.	Violation of Mediation Standards of Conduct	297
a.	Confidentiality	297
b.	Conflict of Interest	297
c.	Mediator Bias	299
	<i>Furia v. Helm</i>	299
d.	Mediator Coercion	308
	<i>Vitakis-Valchine v. Valchine</i>	309
4.	Liability Under Professional Standards of a Separate Profession	314

Table of Contents

a.	Lawyer-Mediators	314
	<i>In re County of Los Angeles</i>	315
b.	Judges as Mediators	321
c.	Other Professions	322
5.	Crimes	322
a.	Unauthorized Practice of Law	322
b.	Miscellaneous Crimes	323
C.	Administrative Action	323
	Notes and Questions	324
III.	RECOMMENDED CONDUCT FOR INDIVIDUAL MEDIATORS	325
A.	Preventative Mediator Conduct	325
1.	Clearly Establish the Role of the Mediator	326
2.	Use Agreements to Mediate to Establish Clear Parameters Regarding Critical Issues	327
3.	Address Any Actions or Behavior That Could Create Liability	327
4.	Handle Conflict of Interest Concerns with Earnest	328
5.	Be Wary About Lengthy Mediations	330
6.	Be Vigilant to Maintain Confidentiality	330
7.	Undertake Pro Se Cases with Caution	331
8.	Be Proactive to Avert Subsequent Challenges to Settlement Documents	331
9.	Anticipate the Rights and Interests of Third Parties	334
10.	Stay Attuned to Good Faith Requirements for Mediation Participants	334
B.	Curative Mediator Conduct	334
1.	Assert Mediator Immunity	334
2.	Maintain Professional Malpractice Insurance	335
3.	Assert any Waivers of Mediation Confidentiality	335
4.	Take Notes During Mediation	335
IV.	CONCLUSION	335
	Notes and Questions	336

Chapter 10 QUALITY CONTROL FOR THE MEDIATION FIELD . . . 337

I.	INTRODUCTION	337
II.	OVERVIEW OF EXISTING MEDIATION REGULATION	338
A.	The Concept of Mediation as a Profession	338
B.	Qualification Standards	339
C.	Credentialing	340
1.	Licensing	341
2.	Certification	341
a.	Efforts by ABA Section of Dispute Resolution to Assure Mediation	

Table of Contents

	Quality	342
b.	ACR’s Efforts to Develop Qualification Standards	342
c.	Statewide Qualification Standards	344
III.	RECOMMENDATIONS FOR BEST PRACTICES	346
A.	Proper Educational and Practical Training, Including Continuing Education	347
1.	Emphasize the Unique Nature of Mediation	347
2.	Emphasize Mediation Ethics	348
3.	Take Advantage of Continuous Training	348
4.	Use Mediators as Mentors	349
B.	Stringent Evaluation of Mediators and Mediation Process	349
1.	Effectiveness of Mediators	349
2.	Effectiveness of Mediation Process	351
C.	Use of Grievance Procedures	351
	Paula M. Young, <i>Take It or Leave It. Lump It or Grieve It: Designing Mediator Complaint Systems That Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i>	351
D.	Use of ADR Ethics Boards and Advisory Committees	359
IV.	CONCLUSION	361
	Notes and Questions	361

Chapter 11 ONLINE DISPUTE RESOLUTION 363

I.	INTRODUCTION	363
II.	BASICS OF ONLINE DISPUTE RESOLUTION	364
A.	Definition of Online Dispute Resolution	364
B.	Historical Development of Online Dispute Resolution	364
III.	ONLINE DISPUTE RESOLUTION SYSTEMS/PLATFORMS	365
A.	Online Administration of Traditional Mediation Services	366
B.	Hybrid Mediation	366
C.	Virtual Mediation	367
1.	Fully Automated Dispute Resolution Processes	367
2.	Non-Binding Use of Technology as an Aid to Mediators	368
D.	Advantages and Disadvantages of ODR, Including Virtual Mediation	369
1.	Advantages of Virtual Mediation	369
a.	Transparency	369
b.	Cost Savings, Speed, and Convenience	369
c.	Effective Communication	370
d.	Balance of Power	371
e.	Avoidance of Emotional Confrontation	371
f.	Mediator Expertise	371

Table of Contents

g.	Creation of Durable Agreements	372
h.	Elimination of Jurisdictional Issues	372
2.	Disadvantages of Virtual Mediation	372
a.	Transparency and Confidentiality	372
b.	Inconvenience	373
c.	Poor Communication	373
d.	Impersonal Atmosphere	374
e.	Imbalance of Power	374
f.	Lack of Mediator Control	374
g.	Repeat Players	374
	Notes and Questions	375
IV.	ETHICS AND ONLINE DISPUTE RESOLUTION	375
A.	Existing ODR Regulation	376
1.	ABA Task Force on Electronic Commerce and Alternative Dispute Resolution	376
2.	United Nations Commission on International Trade Law	377
B.	Ethical Dilemmas for Virtual Mediators	378
1.	Confidentiality	378
2.	Impartiality	379
3.	Conflict of Interest	382
4.	Competence	382
	Susan Nauss Exon, <i>Maximizing Technology to Establish Trust in an Online, Non-visual Mediation Setting</i>	382
C.	Final Thoughts About Developing Ethics for Virtual Mediators	383
	Notes and Questions	385
V.	THE FUTURE OF ONLINE DISPUTE RESOLUTION	387
VI.	CONCLUSION	388

Chapter 12 THE PROGRESSIVE NATURE OF MEDIATION 389

I.	INTRODUCTION	389
II.	EXPANSION OF TRADITIONAL ASPECTS OF MEDIATION	390
A.	Court's Impact on Mediation	390
1.	Procedural Justice	390
2.	Mandatory, Opt-In, and Opt-Out Mediation	391
B.	Online Dispute Resolution	393
C.	Collaborative Law	394
D.	Restorative Justice	396
E.	Mindfulness Mediation	398
F.	Neuroscience	400
1.	Mirror Neurons and Facial Expressions	401

Table of Contents

2.	Emotions	401
3.	Perceptions and Information Processing	402
4.	Decision-Making	403
G.	Conflict Management	404
H.	Expanding Use of Experts in Mediation	404
III.	THE FUTURE OF MEDIATION: THOUGHTS AND SPECULATION . . .	405
A.	Public Education	405
B.	Mediation Specialization	405
C.	Regulation of Mediation	406
D.	Expanding Use of ODR	407
IV.	CONCLUSION	407
	Notes and Questions	408
APPENDIX A	MEDIATION PREPARATION CHECKLIST	411
APPENDIX B	SAMPLE MEDIATOR LETTERS OF INTRODUCTION . .	413
APPENDIX C	AGREEMENT TO MEDIATE	417
APPENDIX D	CONFIDENTIALITY AGREEMENT	421
APPENDIX E	SETTLEMENT AGREEMENT AND GENERAL RELEASE	425
APPENDIX F	SUMMARY OF STEPS FOR AN EFFECTIVE APOLOGY	427
APPENDIX G	SUMMARY OF STEPS FOR FORGIVENESS	429
APPENDIX H	SUMMARY OF THE SIX KEY PRINCIPLES TO PROMOTE TRUST IN MEDIATION	431
APPENDIX I	THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005)	433
APPENDIX J	MEDIATION STANDARDS OF CONDUCT FOR GENERAL CIVIL MATTERS — COMPARISON BY STATE	441
APPENDIX K	UNIFORM MEDIATION ACT	451
APPENDIX L	UNIFORM COLLABORATIVE LAW ACT	459
INDEX	I-1