

**MEDIATION
THEORY AND PRACTICE**

LexisNexis Law School Publishing Advisory Board

Paul Caron

Charles Hartsock Professor of Law
University of Cincinnati College of Law

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

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

MEDIATION THEORY AND PRACTICE

Third Edition

James J. Alfini

*Dean Emeritus & Professor of Law
South Texas College of Law*

Sharon B. Press

*Professor of Law & Director, Dispute Resolution Institute
Hamline University School of Law*

Joseph B. Stulberg

*Michael E. Moritz Chair in Alternative Dispute Resolution
The Ohio State University Moritz College of Law*

ISBN: 978-0-7698-6380-1 (casebook)

ISBN: 978-0-7698-6284-2 (looseleaf)

ISBN: 978-0-3271-8531-4 (ebook)

Library of Congress Control Number: 2013939482

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 © 2013 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 Barry, Carol, and Midge.

Preface to the Third Edition

In the seven years since we published the second edition of *Mediation Theory and Practice*, there have been a number of significant new developments in the mediation field and some changes in our personal lives. Jim Alfini transitioned to Dean Emeritus at South Texas College of Law. Sharon Press left the Florida Dispute Resolution Center to join the faculty at Hamline University School of Law and become the Director of the Dispute Resolution Institute. Our colleague and friend, Jean Sternlight, became immersed in multiple projects that commanded her time and talent, and so opted to withdraw from participating in developing the new edition; we continue to benefit from Jean's wise counsel and insights and we thank her for her extraordinary contributions to the first and second editions of this book.

Based on valued feedback from our colleagues in the mediation field who have used the text, as well as our experience with it, we have retained the primary content of the previous text but made significant changes to the manner in which we present and organize the materials. In particular, for this new edition, we importantly revised and updated the presentation of the materials in Chapter 1 and developed a new final chapter (Chapter 11) that captures in one place our previous discussion of the many contexts in which mediation is used and career possibilities in the field (previously Chapters 11 and 12). Further, we revised the order of presentation of materials in the following ways: Chapter 8 has been modified to focus exclusively on ethical issues in mediation, and the treatment of these materials is enriched by inclusion of notes and questions drawn from actual mediator grievances and advisory opinions. In addition, we moved the materials on mediator certification issues and judicial mediation to Chapter 9 (the institutionalization of mediation in the courts) and now follow that with Chapter 10, retitled as *Mediation and the Lawyer as Advocate*, with several new entries that reflect the increased focus on the lawyers' role as advocate for their clients who will be participating in mediation sessions and the resulting ethical issues.

Prominent among the new developments in the mediation field were an increased focus on the role of advocates in mediation and increases in the depth and breadth of advisory ethics opinions for mediators and mediation case law, especially in the area of good faith participation. In addition, mediation is increasingly being used to deal with major societal problems such as the foreclosure crisis. This new edition addresses these matters in enriched ways. As in previous editions, we have tried to include excerpts from both classic and new literature sources in this field as well as references and excerpts from new case law developments. We were greatly aided by our colleagues in the mediation field who continue to point us in the right direction and in some cases were very generous in granting us royalty-free permission to republish excerpts from their works.

Once again, our home institutions provided us with very helpful support. We thank our colleagues at Hamline University School of Law, The Ohio State University, Michael E. Moritz College of Law, and South Texas College of Law. Professor Stulberg also extends his deep appreciation to Ikerbasque, the Basque Foundation for Science, for awarding him a 2012 Ikerbasque Fellowship that partially supported his research in preparing this new edition. Our students also provided us with excellent feedback in the classroom, letting us know of the strengths and weaknesses of the previous edition. We owe a great deal of thanks to Ben Lowndes, a second year student at Hamline University School of

Preface to the Third Edition

Law and South Texas College of Law students Alanna Beck (3L) and Martin Pytlewski (2L) each of whom provided us with extraordinary research assistance in producing this third edition. Jennifer Beszley at Lexis Publishing also deserves our thanks for her editorial assistance and helpful direction through the publishing process.

Table of Contents

Chapter 1	HISTORICAL CONTEXT AND CONCEPTUAL FRAMEWORK	1
A.	INTRODUCTION	1
1.	Why Study Mediation?	1
2.	Historical Perspective	2
B.	THE FOUNDATIONAL YEARS OF THE CONTEMPORARY ADR MOVEMENT: 1960s AND 1970s	4
1.	The Challenges	4
a.	A Hot City Night	4
b.	Neighborhood Citizenship	5
c.	Working for Local Government	6
2.	The Grand Experiment	6
a.	Diagnosing the Challenge	6
b.	The Building Blocks of Mediation Services	8
3.	Lessons of the “Grand Experiment”	10
C.	MEDIATION’S GROWTH AND IMPACT ON THE JUSTICE SYSTEM	12
1.	Introduction	12
2.	Practice	12
a.	The Rise or Decline of the Dominant Practice Areas of the Foundational Years	12
3.	Expanded Areas of Practice	13
a.	Areas of Emerging and Expansive Growth	13
4.	Promoting Quality Practice	21
5.	Scholarship	23
a.	Theory Centers	23
b.	Legal Scholarship	24
c.	Degree Programs	25
5.	The Challenges of Growth	26
Chapter 2	NEGOTIATION	27
A.	OVERVIEW	27
	Note on Negotiation Terminology	27
B.	NEGOTIATION STRATEGIES AND BEHAVIOR	29
1.	Integrative Versus Distributive Negotiation	29
	Russell Korobkin, <i>Against Integrative Bargaining</i>	30
	Noam Ebner & Adam Kamp, <i>Relationship 2.0</i>	37
	Notes and Questions	40

Table of Contents

2.	Cooperative Versus Competitive Negotiation	41
	Gerald R. Williams, <i>LEGAL NEGOTIATION AND SETTLEMENT</i>	41
	Gary Goodpaster, <i>A Primer on Competitive Bargaining</i>	43
	Gerald R. Williams, <i>LEGAL NEGOTIATION AND SETTLEMENT</i>	50
	Notes and Questions	53
3.	Problem-Solving Negotiation	53
	Carrie Menkel-Meadow, <i>Toward Another View of Legal Negotiation: The Structure of Problem-Solving</i>	53
	Notes and Questions	60
4.	What's in a Label?	60
	Andrea Kupfer Schneider, <i>Teaching a New Negotiation Skills Paradigm</i>	60
	Note and Question	65
C.	NEGOTIATION ETHICS	65
	Ruth Fleet Thurman, <i>Chipping Away at Lawyer Veracity: The ABA's Turn Toward Situation Ethics in Negotiations</i>	66
	Charles Craver, <i>Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive</i>	68
	Notes and Questions	73
D.	PSYCHOLOGICAL AND ECONOMIC ANALYSES	74
	Richard Birke & Craig R. Fox, <i>Psychological Principles in Negotiating Civil Settlements</i>	75
	Robert H. Mnookin, <i>Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict</i>	86
	Notes and Questions	94
E.	ONLINE NEGOTIATION	95
	Noam Ebner et al., <i>You've Got Agreement: Negoti@ting Via Email</i>	95
	Note and Questions	102
Chapter 3 MEDIATION PROCESS AND SKILLS		103
A.	INTRODUCTION	103
B.	INITIAL CONSIDERATIONS	103
1.	Mediation Process	103
a.	The Beginning	104
b.	Accumulating Information	104
c.	Developing an Initial Agenda	104
d.	Generating Movement	104
e.	Ending the Mediation	104
2.	The Mediator	105
	<i>Performance-Based Assessment: A Methodology, for Use in Selecting, Training, and Evaluating Mediators</i>	105

Table of Contents

3.	Mediator Functions	106
	Notes and Questions	107
4.	Beginning the Mediation Process	107
	Notes and Questions	109
C.	MEDIATION PROCESS	109
1.	Mediator's Opening Statement	109
a.	Introductions	110
b.	Establishing Credibility and Impartiality	111
c.	Explaining Mediation and the Role of the Mediator	112
d.	Explaining the Procedures That Will Govern the Process	112
2.	Accumulating Information	114
a.	Pre-Mediation Information/Case File	115
b.	The Disputants' Opening Statements	115
c.	Notes	116
d.	Listening Skills	117
	Joseph B. Stulberg & Lela P. Love, <i>The Middle Voice: Mediating Conflict Successfully</i>	117
e.	Questioning	119
f.	Non-Verbal Communication	120
3.	Agenda Development	121
a.	Characterizing the Issues	121
b.	Priorities	123
c.	Structuring the Discussion	123
4.	Generating Movement	124
a.	Procedural Items	125
b.	Informational Items	125
c.	Relationship Issues	126
5.	The Separate Session (Caucus)	127
a.	Rationale and Sequence of Separate Sessions	127
b.	Why Not Meet Separately?	128
c.	Principles of the Separate Session	129
d.	The Mechanics of the Separate Session	130
6.	Concluding the Mediation	133
a.	No Agreement	134
b.	Agreement	135
i.	Format of an Agreement	135
ii.	Enforcement	136
D.	OTHER FORMS OF MEDIATION	137
1.	Transformative Mediation	137
	Robert A. Baruch Bush & Joseph P. Folger, <i>Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative</i>	

Table of Contents

	<i>Approach to Practice</i>	137
	Questions	140
2.	Evaluative Mediation	141
	Marjorie Corman Aaron, <i>Do's and Don'ts for Mediation Practice</i> . .	141
	Questions	144
Chapter 4	MEDIATOR ROLES, ORIENTATIONS, AND STYLES	147
A.	INTRODUCTION	147
B.	MEDIATOR ROLES	147
1.	Role Conceptions	147
	Lon L. Fuller, <i>Mediation — Its Forms and Functions</i>	148
	Robert A. Baruch Bush, <i>Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation</i>	149
	Notes and Questions	154
2.	Mediator Accountability	154
	Lawrence Susskind, <i>Environmental Mediation and the Accountability Problem</i>	155
	Joseph B. Stulberg, <i>The Theory and Practice of Mediation: A Reply to Professor Susskind</i>	157
	<i>Core Values of Dispute Resolution: Is Neutrality Necessary?</i>	162
	Notes and Questions	166
C.	MEDIATOR ORIENTATIONS	169
1.	Facilitative vs. Evaluative	169
	Leonard L. Riskin, <i>Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed</i>	169
	Notes and Questions	174
	Lela P. Love, <i>The Top Ten Reasons Why Mediators Should Not Evaluate</i>	175
	Donald T. Weckstein, <i>In Praise of Party Empowerment — And of Mediator Activism</i>	177
	Leonard L. Riskin, <i>Decisionmaking in Mediation: The New Old Grid and the New New Grid System</i>	180
2.	Transformative Mediation	183
	Robert A. Baruch Bush & Joseph P. Folger, <i>The Promise of Mediation: The Transformative Approach to Mediation</i>	183
	Notes and Questions	191
3.	Other Mediator Orientations	191
a.	Understanding-Based Mediation	191
	Gary Friedman & Jack Himmelstein, <i>Resolving Conflict Together:</i>	

Table of Contents

	<i>The Understanding-Based Model of Mediation</i>	192
	Notes and Questions	195
D.	MEDIATOR STYLES	196
	James J. Alfini, <i>Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?</i>	196
	Notes and Questions	201
Chapter 5	CONFIDENTIALITY	205
A.	INTRODUCTION	205
B.	POLICY	206
	Michael L. Prigoff, <i>Toward Candor or Chaos: The Case of Confidentiality in Mediation</i>	206
	<i>National Labor Relations Board v. Macaluso</i>	207
	Notes and Questions	210
	<i>Cassel v. Superior Court</i>	211
	Notes and Questions	217
C.	CONTRACT	218
	James J. Alfini & Eric Galton, <i>Confidentiality Agreement of Rodney Max</i>	218
	Note	219
D.	EVIDENTIARY EXCLUSIONS	219
1.	Introduction	219
2.	Federal Rules of Evidence, Rule 408. Compromise Offers and Negotiation	219
	Charles W. Ehrhardt, <i>Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court</i>	220
	<i>In re Denture Cream Products Liability Litigation</i>	222
	Notes and Questions	225
E.	PRIVILEGE	226
	Alan Kirtley, <i>The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest</i>	227
	NCCUSL & ABA, Uniform Mediation Act	232
	Notes and Questions	235
	<i>Federal Deposit Insurance Corporation v. White</i>	236
	<i>Sheldone v. Pennsylvania Turnpike Commission</i>	240
	Notes and Questions	243
	<i>Society of Lloyd’s v. Moore</i>	244
	Notes and Questions	248
F.	EXCEPTIONS	249
	Alan Kirtley, <i>The Mediation Privilege’s Transition from Theory to</i>	

Table of Contents

	<i>Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process, and the Public Interest</i>	249
	NCCUSL & ABA, Uniform Mediation Act	254
	Notes and Questions	255
	<i>Ohio ex rel. Schneider v. Kreiner</i>	256
	<i>Olam v. Congress Mortgage Company</i>	260
	<i>In re Teligent, Inc.</i>	271
	Notes and Questions	273
G.	ALTERNATIVES TO THE UNIFORM MEDIATION ACT	273
	Brian D. Shannon, <i>Dancing With the One That “Brung Us” — Why the Texas ADR Community Has Declined to Embrace the UMA</i>	274
	Richard C. Rubin, <i>The Sound of Dust Settling: A Response to Criticisms of the UMA</i>	279
	Notes and Questions	283
Chapter 6	LEGAL ISSUES IN MEDIATION	285
A.	INTRODUCTION	285
B.	AGREEMENTS TO MEDIATE AND STATUTORY REQUIREMENTS TO MEDIATE	285
	<i>Brosnan v. Dry Cleaning Station</i>	286
	<i>Klinge v. Bentien</i>	288
	<i>Annapolis Professional Firefighters Local 1926 v. City of Annapolis</i>	291
	Notes and Questions	296
C.	JUDICIAL POWER TO COMPEL MEDIATION	297
	<i>In re Atlantic Pipe Corporation</i>	297
	<i>Liang v. Lai</i>	303
	Notes and Questions	305
D.	MEDIATION IN “GOOD FAITH”	305
	<i>Pitts v. Francis</i>	306
	Peter N. Thompson, <i>Good Faith Mediation in the Federal Courts</i>	310
	Notes and Questions	314
	<i>In re Bolden</i>	316
	<i>Nick v. Morgan’s Foods, Inc.</i>	318
	Notes and Questions	323
	ABA Section of Dispute Resolution on Good Faith Requirements for Mediators and Mediation Advocates in Court-Mandated Mediation Programs	324
E.	ENFORCEABILITY OF MEDIATED AGREEMENTS	326
	<i>Fidelity and Guaranty Insurance Co. v. Star Equipment Corp.</i>	327
	<i>Guthrie v. Guthrie</i>	330
	<i>In re Marriage of Ames</i>	332

Table of Contents

	Notes and Questions	335
	<i>Silkey v. Investors Diversified Services, Inc.</i>	335
	Notes and Questions	340
	<i>Ali Haghghi v. Russian-American Broadcasting Co.</i>	341
	<i>Ali Haghghi v. Russian-American Broadcasting Co.</i>	342
	Notes and Questions	345
	<i>Del Bosque v. AT & T Advertising</i>	346
	<i>Ferguson v. Ferguson</i>	348
	Notes and Questions	350
Chapter 7	DIVERSITY, POWER, AND JUSTICE	353
A.	INTRODUCTION	353
B.	DIVERSITY, INDIVIDUAL DIFFERENCES, AND THE RESOLUTION OF DISPUTES	354
	Michelle LeBaron Duryea & J. Bruce Grundison, <i>Conflict and Culture: Research in Five Communities in Vancouver, British Columbia</i>	355
	Notes and Questions	363
	Deborah M. Kolb & Gloria C. Coolidge, <i>Her Place at the Table: A Consideration of Gender Issues in Negotiation</i>	365
	Notes and Questions	369
	Joseph B. Stulberg & Lela P. Love, <i>Community Dispute Resolution Training Manual, Revised Edition</i>	370
C.	POWER AND THE RESOLUTION OF CONFLICT	370
	Richard Delgado et al., <i>Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution</i>	371
	Trina Grillo, <i>The Mediation Alternative: Process Dangers for Women</i>	375
	Notes and Questions	384
	Michelle Hermann et al., <i>An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation</i>	385
	Notes and Questions	389
D.	JUSTICE: MEDIATION AND THE RULE OF LAW	391
	Owen Fiss, <i>Against Settlement</i>	391
	Notes and Questions	396
	Carrie Menkel-Meadow, <i>Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)</i>	396
	Notes and Questions	400
	Jonathan M. Hyman & Lela P. Love, <i>If Portia Were a Mediator: An Inquiry Into Justice in Mediation</i>	401
	Note and Question	403
	Association for Conflict Resolution Annual Conference 2003,	

Table of Contents

	<i>The World of Conflict Resolution: A Mosaic of Possibilities</i>	403
	Notes and Questions	405
	Jonathan M. Hyman, <i>Swimming in the Deep End: Dealing with Justice in Mediation</i>	406
	Note and Question	412
Chapter 8	ETHICAL ISSUES FOR MEDIATORS	413
A.	INTRODUCTION	413
B.	MEDIATOR STANDARDS OF CONDUCT	413
1.	Self-Determination	414
a.	Model Standards of Conduct for Mediators	414
b.	Mediation Dilemmas for Discussion	415
	Notes and Questions	416
2.	Impartiality/Conflicts of Interest	418
a.	Model Standards of Conduct for Mediators	418
b.	Mediation Dilemmas for Discussion	419
	Notes and Questions	420
3.	Mediator Competence	420
a.	Model Standards of Conduct for Mediators	421
b.	Mediation Dilemmas for Discussion	421
	Notes and Questions	422
4.	Confidentiality	422
a.	Model Standards of Conduct for Mediators	422
b.	Mediation Dilemmas for Discussion	423
5.	Quality of Process	424
a.	Timeliness	424
i.	Model Standards of Conduct for Mediators	424
ii.	Mediation Dilemmas for Discussion	424
	Notes and Questions	425
b.	Participation and Candor	425
i.	Model Standards of Conduct for Mediators	425
ii.	Mediation Dilemmas for Discussion	425
	Notes and Questions	425
c.	Advice, Opinions, Information	426
i.	Model Standards of Conduct for Mediators	426
ii.	Mediation Dilemmas for Discussion	426
	Notes and Questions	427
d.	Adjournment or Termination	429
i.	Model Standards of Conduct	429
ii.	Mediation Dilemmas for Discussion	429
	Notes and Questions	430

Table of Contents

6.	Advertising/Solicitation	431
a.	Model Standards of Conduct for Mediators	431
b.	Mediation Dilemmas for Discussion	431
	Notes and Questions	432
7.	Fees and Expenses	432
a.	Model Standards of Conduct	432
b.	Mediation Dilemmas for Discussion	433
	Notes and Questions	434
8.	Obligations to the Profession	434
a.	Model Standards of Conduct	434
	Notes and Questions	434
C.	ENFORCEMENT OF ETHICAL STANDARDS	435
	Michael Moffitt, <i>Ten Ways to Get Sued: A Guide for Mediators</i>	435
	Melvin Rubin, <i>Mediator Malpractice: A Proposed Defensive Path Through the Minefield</i>	444
	Notes and Questions	446
D.	MEDIATION AND THE LEGAL SYSTEM	446
1.	Is Mediation the Practice of Law?	447
	Carrie Menkel-Meadow, <i>Mediation and the Legal System, Is Mediation the Practice of Law?</i>	447
	Bruce Meyerson, <i>Lawyers Who Mediate Are Not Practicing Law</i>	449
	Notes and Questions	450
2.	Confusing the Role of Lawyer and Mediator	452
	Rule 2.4 Lawyer Serving as Third-Party Neutral	452
	Notes and Questions	454
3.	Conflict of Interest Issues Facing the Lawyer-Mediator	454
	Rule 1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral	454
	Notes and Questions	455
	<i>With Conflicts at Issue, Florida Firm and Its Former Partners Restructure ADR — Again</i>	456
	Notes and Questions	457
4.	Fee Sharing Issues Facing the Lawyer-Mediator	458
	Notes and Questions	459
5.	Advertising and Solicitation Issues Facing the Lawyer-Mediator	459
	Notes and Questions	460
Chapter 9	THE INSTITUTIONALIZATION OF MEDIATION IN THE COURTS	463
A.	INTRODUCTION	463
B.	DEVELOPMENT OF INSTITUTIONALIZATION	464

Table of Contents

	Frank E.A. Sander, <i>The Future of ADR</i>	464
	Notes	467
C.	INSTITUTIONALIZATION OF MEDIATION IN THE COURT	
	CONTEXT: POLICY DEVELOPMENT	467
	Robert A. Baruch Bush, <i>Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation</i>	468
	John P. McCrory, <i>Mandated Mediation of Civil Cases in State Courts: A Litigant's Perspective on Program Model Choices</i>	473
	Donald T. Weckstein, <i>Mediator Certification: Why and How</i>	476
	Notes and Questions	478
	Sharon Press, <i>Institutionalization: Savior or Saboteur of Mediation?</i>	480
	Notes and Questions	483
D.	EMPIRICAL EVALUATIONS	486
	Jennifer Shack, <i>Efficiency: Mediation in Courts Can Bring Gains, but Under What Conditions?</i>	486
	Notes and Questions	488
E.	CRITIQUES OF INSTITUTIONALIZATION	492
	Carrie Menkel-Meadow, <i>Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"</i>	493
	James Alfini et al., <i>What Happens When Mediation Is Institutionalized?: To the Parties, Practitioners, and Host Institutions</i>	498
	Wayne D. Brazil, <i>Court ADR 25 Years After Pound: Have we Found a Better Way?</i>	503
	Nancy A. Welsh, <i>The Place of Court-Connected Mediation in a Democratic Justice System</i>	509
	Notes and Questions	513
F.	JUDICIAL MEDIATION	514
	<i>Home Depot, U.S.A., Inc. v. Saul Subsidiary I Ltd. Partnership</i>	514
	<i>Evans v. State</i>	515
	Notes and Questions	517
	Honorable John C. Cratsley, <i>Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet</i>	518
	Notes and Questions	521
	Committee on Codes of Conduct Advisory Opinion No. 95	522
	Notes and Questions	525
	<i>Black v. Kendig</i>	525
	<i>Novak v. Farneman</i>	528
	Notes and Questions	531

Table of Contents

Chapter 10	MEDIATION AND THE LAWYER AS ADVOCATE . . .	533
A.	INTRODUCTION	533
B.	THE RELATIONSHIP BETWEEN MEDIATION AND LITIGATION	533
	Dr. Julie Macfarlane, <i>The Evolution of the New Lawyer: How Lawyers Are Reshaping the Practice of Law</i>	535
	Notes and Questions	540
C.	LAWYERS' ROLE IN MEDIATION	541
	Notes and Questions	543
1.	Lawyers' Role in Selecting a Mediator	544
	David Geronemus, <i>Mediation of Legal Malpractice Cases: Prevention and Resolution</i>	545
	Jean R. Sternlight, <i>Lawyer's Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting</i>	547
	Notes and Questions	548
2.	Does the Participation of Lawyers Benefit or Harm the Mediation Process?	549
	Craig A. McEwen et al., <i>Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation</i>	550
	Uniform Mediation Act, Section 10	552
	Notes and Questions	552
3.	How Lawyers Advocate for Their Clients in Mediation	553
	Carrie Menkel-Meadow, <i>Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities</i>	554
	Harold Abramson, MEDIATION REPRESENTATION: ADVOCATING IN A CREATIVE PROBLEM-SOLVING PROCESS	555
	Jean R. Sternlight, <i>Lawyer's Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting</i>	556
	Questions	558
	Jean R. Sternlight, <i>What's a Lawyer to Do in Mediation?</i>	558
	Tom Arnold, <i>20 Common Errors in Mediation Advocacy</i>	561
	Dwight Golann, <i>Mediation Advocacy: The Role of Lawyers in Mediation</i>	566
	Notes and Questions	574
4.	What Ethical Constraints Apply to Lawyers in Mediation?	575
	Formal Opinion 06-439, April 12, 2006	576
	James Alfini, <i>Settlement Ethics and Lawyering in ADR Proceedings:</i>	

Table of Contents

	<i>A Proposal to Revise Rule 4.1</i>	577
	Notes and Questions	578
Chapter 11	CAREER DIRECTIONS IN MEDIATION	579
A.	INTRODUCTION	579
B.	CAREERS IN MEDIATION	579
1.	Substantive Practice Areas: The Range of Possibilities	579
a.	Small Claims Mediation and Neighborhood Justice Center Programs	580
b.	Family Mediation	580
c.	“Civil Law Cases”	581
d.	Elder Care	583
e.	Probate	584
f.	Peer Mediation	584
g.	Bioethical Disputes	584
h.	Environmental Disputes	585
i.	Public Policy Disputes	585
2.	Independent Mediation Practices	586
	Eric R. Galton, <i>ADR Personalities and Practice Tips</i>	586
	Steven Gonzales, <i>ADR Personalities and Practice Tips</i>	590
	Dana L. Curtis, <i>ADR Personalities and Practice Tips</i>	593
	Richard Chernick, <i>ADR Personalities and Practice Tips</i>	595
	Notes and Questions	598
3.	Organization-Based Employment Opportunities	598
a.	Mediator Positions in Agencies and Organizations	599
b.	Working for a Dispute Resolution Agency	599
i.	Dispute Resolution Agencies That Provide Direct Service	600
ii.	Working for a DR Administrative or Provider Organization	600
C.	MEDIATION’S PROMISE	601

Table of Contents

APPENDIX A	MODEL STANDARDS OF CONDUCT FOR MEDIATORS	603
APPENDIX B	REPORTER’S NOTES	611
APPENDIX C	MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION [DRAFT August 2000]	633
APPENDIX D	SPECIAL POLICY CONSIDERATIONS FOR STATE REGULATION OF FAMILY MEDIATORS AND COURT- AFFILIATED PROGRAMS	643
APPENDIX E	FLORIDA RULES FOR CERTIFIED AND COURT- APPOINTED MEDIATORS	645
APPENDIX F	UNIFORM MEDIATION ACT	677
REFERENCES		685
TABLE OF CASES		TC-1
INDEX		I-1
