

Mediation

Skills and Techniques

SECOND EDITION

Laurence J. Boulle, B.A., LL.B., LL.M., Ph.D.

BELL WIESE PROFESSOR OF LAW
UNIVERSITY OF NEWCASTLE, AUSTRALIA
ADJUNCT PROFESSOR, BOND UNIVERSITY, AUSTRALIA
ACCREDITED MEDIATOR, AUSTRALIA
DIRECTOR, INDEPENDENT MEDIATION SERVICES LTD

Michael T. Colatrella Jr., J.D., LL.M.

PROFESSOR OF LAW
MCGEORGE SCHOOL OF LAW, UNIVERSITY OF THE PACIFIC
FORMER DIRECTOR OF THE CENTER FOR DISPUTE RESOLUTION,
SCHOOL OF EDUCATION AND HUMAN DEVELOPMENT,
SOUTHERN METHODIST UNIVERSITY

Anthony P. Picchioni, Ph.D.

EDUCATIONAL CONSULTANT, BAYLOR UNIVERSITY MEDICAL CENTER FORMER CHAIR OF THE DEPARTMENT OF DISPUTE RESOLUTION AND COUNSELING, SIMMONS SCHOOL OF EDUCATION AND HUMAN DEVELOPMENT, SOUTHERN METHODIST UNIVERSITY



Copyright © 2023 Carolina Academic Press, LLC All Rights Reserved

LIBRARY OF CONGRESS CATALOGING-IN-PUBLICATION DATA

Names: Boulle, Laurence, 1949- author. | Colatrella, Michael T., Jr., author. | Picchioni, Anthony P., author.

Title: Mediation : skills and techniques / by Laurence Boulle, Michael Colatrella, Anthony Picchioni.

Description: Second edition. | Durham, North Carolina : Carolina Academic Press, 2023. | Includes index.

Identifiers: LCCN 2022059508 (print) | LCCN 2022059509 (ebook) | ISBN 9781531026134 (paperback) | ISBN 9781531026141 (ebook)

Subjects: LCSH: Mediation--United States. | Dispute resolution (Law)--United States. | Conflict management--United States.

Classification: LCC KF9084 .B68 2023 (print) | LCC KF9084 (ebook) | DDC 347.94/09--dc23/eng/20230206

LC record available at https://lccn.loc.gov/2022059508

LC ebook record available at https://lccn.loc.gov/2022059509

Carolina Academic Press 700 Kent Street Durham, North Carolina 27701 (919) 489-7486 www.cap-press.com

Printed in the United States of America

Ruby, Cillian, Willow, and Jack, Future dispute resolvers

-LB

Jean Mary Shanley, Anna Catherine Colatrella, and Jonathan Michael Colatrella, who remind me why peace matters

-MTC

and

Deborah Oravec Picchioni, my best friend

-APP

Summary of Contents

ONE	•	Introduction to Learning Mediation Skills and Techniques	3
TWO	•	Establishing the Foundation: Introductions, Intake, Screening, and Preparation	29
THREE		Maintaining a Favorable Climate	55
FOUR		Managing the Mediation Process	71
FIVE		Assisting the Communication Process	137
SIX		Managing Conflict from Crisis to Opportunity	167
SEVEN		Facilitating the Negotiations	207
EIGHT		Encouraging Settlement	269
NINE		Managing Power in Mediation	287
TEN		Variations in the Mediation Process	305
ELEVEN		Virtual Mediation	325
TWELVE		Use of Evaluation in Mediation	339
THIRTEEN		Special Issues in Mediation	353
FOURTEEN		Avoiding Mediator Traps	377
FIFTEEN		Becoming a Mediator, Careers in Mediation, and Establishing a Private Mediation Practice	395

Contents

Abo	ut the Authors	xxvii
Ackı	nowledgments	xxix
One	· Introduction to Learning Mediation Skills and Techniques	3
I.	Mediation's Role and Benefits	3
	A. Mediation Defined	3
	B. Benefits of Mediation	5
	1. Greater Participant Control Over the Proceedings	
	and Outcome	6
	2. Greater Likelihood of Preserving and Enhancing the	
	Relationship of the Participants	7
	3. Greater Access to Creative and Adaptable Solutions	7
	4. Quicker Resolutions for Participants	8
	5. Less Expensive Proceedings for Participants	8
	6. Conservation of Court Resources	8
	C. Uses and Applications of Mediation	9
	1. Labor Disputes	9
	2. Civil Cases	10
	3. Community Disputes	10
	4. Family Matters	10
	5. Business Disputes	11
	6. Special Education Disputes	11
	7. Public Policy Disputes	12
	a. A Note on International Commercial Mediation	12
	D. Limitations of Mediation	14
II.	Scope and Organization of This Book	14
III.	Mediation Is a Skill, Not a Talent	15
IV.	The Mediator's Skills and Techniques Toolbox	17
V.	Mediation Models	18
	A. The Models Defined	18
	1. Facilitative Mediation	18
	2. Transformative Mediation	19
	3. Evaluative Mediation	19

X CONTENTS

	B. The Eclectic Use of the Models	20
VI.	Functions of the Mediator	20
	A. Creating Favorable Conditions for the Parties	21
	B. Assisting the Parties to Communicate	21
	C. Facilitating the Parties' Negotiations	21
	D. Encouraging Settlement	22
	E. Identifying and Managing Cultural Differences	22
	1. Culture and Mediation	23
VII.	Evaluating Your Effectiveness	24
VIII.	Overview of a Real Mediation	25
IX.	Exercises	28
Two	· Establishing the Foundation: Introductions, Intake,	
	Screening, and Preparation	29
I.	Overview	29
II.	Entering the Dispute	30
	A. Joint Introductions and Communications	30
	B. Preliminary Conferences	31
	C. The "One-Party" Approach	32
III.	Gathering Information	33
	A. Identifying the Participants	34
	B. Identifying the Issues	35
	C. Status of the Litigation	35
	D. Reviewing Documents	36
	E. Written Party Statements	37
	F. Scheduling	37
IV.	Assessment	38
	A. Conflicts of Interest	38
	B. Mediator Competence	39
	C. Appropriateness for Mediation	39
	D. Authority of Participants	41
V.	Educating the Parties About the Mediation Process	42
	A. The Mediation Process	43
	B. Mediator's Particular Approach to Mediation	44
	C. Mediator's Background and Experience	45
	D. The Agreement to Mediate, Fees, and Charges	46
VI.	Practical Preparation for the Mediation Meeting	47
	A. Timing	47
	B. Duration	48
	C. Facilities	49
	D. Amenities	49
	E. Arrivals, Waiting Facilities, and Departures	50
	F. Seating	50

	G. Visuals	52
	H. Security	52
VII.	Special Circumstances and Techniques	52
	A. Team Negotiations	52
	B. Pre-Mediation Conferences with the Parties Separately	53
VIII.	Exercises	54
Thre	e · Maintaining a Favorable Climate	55
I.	The Role of the Mediator in "Climate Control"	55
II.	Reasons for a Poor Climate	56
	A. Reasons Pertaining to Pre-Mediation Developments	56
	B. Reasons Pertaining to the Individual Parties	57
	C. Power Imbalances and Fear of Losing	58
	D. Reasons Pertaining to the Mediation Process	59
III.	Strategies for Improving the Climate	59
	A. The Trust Factor	59
	1. Why Trust Is Important	59
	2. Generating Trust in the Mediator	60
	3. Generating Trust in the Mediation Process	60
	4. Helping the Parties Develop Faith in Their Own	
	Negotiating Abilities	61
	B. Managing Expectations	61
	C. Other Ways to Improve Climate	62
	1. Promoting Optimism, a Positive Tone, and a	
	Mood of Confidence	62
	2. Productive Communication, Structure, and Security	62
	3. Acknowledging Concerns	63
	4. Normalizing	63
	5. Getting Out of the Past and Into the Future	63
	6. Mutualizing the Unhappiness	64
	7. Reducing the Pressure to Settle	64
	8. Relieving Tension Through Humor	64
	9. More Ritual for Mediation	65
IV.	Dealing with Intense Emotions	65
	A. Overview	65
V.	Discourage the Expression of Intense Emotion	66
	A. Ignore the Emotion and Proceed with the Mediation	67
	B. Acknowledge the Emotion, and Then Continue	67
	C. Encourage Some Venting of the Emotion	68
	D. Identify and Deal with the Underlying Problem Therapeutically	68
	E. Selecting a Strategy	69
	F. Overcoming Clients' Fundamental Fears	69
VI.	Exercises	70

xii CONTENTS

Four · Managing the Mediation Process	71
I. The Power of Process	71
II. Stages in the Process	72
A. Mediator's Opening Statement	72
1. Purpose	72
2. Principles	73
a. Clear	73
b. Concise	74
c. Conversational	74
d. Confident	74
e. Constructive	74
3. Elements	74
a. Preliminaries	75
b. Explaining the Nature of Mediation	76
c. Explaining the Mediation Process	77
d. Explaining the Guidelines	78
e. One Person Speaks at a Time	78
f. No Personal Attacks	78
g. Anyone Can Take a Break at Any Time for Any Reason.	79
i. No Binding Agreement Until Reduced to Writing and	
Signed by the Parties.	79
ii. Confidentiality Obligations.	79
iii. Commitment to Comply.	80
h. Commitment to Begin the Mediation	80
4. Confidentiality in Mediation	80
a. Mediator's Duty to Keep Mediation Communications	
Confidential	81
b. Mediator's Duty to Keep Information Shared by One	
Party Confidential from Other Parties	82
c. Mediation Participants May Also Be Bound	
by Confidentiality	82
d. Exclusion of Using Mediation Communications as	
Evidence in Subsequent Legal Proceedings	83
e. Exclusion of Calling Mediators as Witnesses or of	
Subpoenaing Mediator Notes	84
f. Exceptions to Mediation Confidentiality	84
g. Mediator's Duty to Explain Confidentiality to Participants	85
5. Example of a Mediator's Opening Statement	86
6. Other Matters	90
a. Omitting an Important Element of the Opening Statement	90
b. Mediator's Opening Statement Where There Are	
Two or More Mediators	90

CONTENTS	xiii
----------	------

D. Th. D. ati. 2 In: 1: 1 Ct. t	00
B. The Parties' Initial Statements	90
1. The Parties' Statements	90 90
a. Purpose	90
b. Scope c. Focus	91
d. Who Makes the Party Statements?	92
e. Party Speaking Order	93
f. Deciding Who Speaks First	93
i. Private Rationales for Who Speaks First.	94
ii. Public Explanations for Who Speaks First.	94
iii. Allowing the Parties to Choose Who Speaks First.	95
g. Preventing a Defensive Response from the Second Speaker	95
h. The Party Statements Should Be Addressed to the Mediator	95
i. The Mediator's Role During the Parties' Initial Statements	96
j. Note-Taking by the Mediator	97
k. Requests for a "Right of Reply"	98
2. Mediator Summaries of the Parties' Statements	99
a. Purpose	99
b. Process	99
c. Types of Summaries	99
i. Actual Summary.	99
ii. Reframed Summary.	99
iii. Cross-Summaries.	100
C. Defining the Problem	100
1. Purpose	100
2. Process	101
3. Using Pre-Mediation Conferences	101
4. Uncovering Interests	102
a. Positions and Interests	102
b. Types of Interests	102
c. Uncovering Interests	102
5. Identify Areas of Agreement	104
6. Developing An Issue Agenda	105
a. Crafting the Issues	105
b. Different Levels of Defining the Issues	107
c. Form for the List of Issues	107
d. Avoid Framing the Problem as a Single Issue	108
e. Addressing "One-Party" Issues	109
f. Presenting the List of Issues Visually	109
g. Prioritizing the Issues	110
h. Standard Issue Lists	111
i. Using the List of Issues	111
i. Come the flot of loades	111

xiv CONTENTS

	D. Problem Solving and Negotiation	112
	1. Purpose	112
	2. Style	112
	3. Storytelling	113
	a. Benefits of Permitting Storytelling	113
	b. Limitations of Storytelling	114
	c. Guidelines to Manage Storytelling	115
	4. Procedure	117
	a. Packaging Issues	117
	b. Problem-Solving Processes	118
	i. Open Discussion.	118
	ii. Interest-Based Negotiation.	118
	iii. Positional Negotiation.	120
	E. Final Decision and Closure	120
	1. Purpose	120
	2. The Agreement	120
	a. Level of Commitment	120
	i. Oral Agreements.	121
	ii. Non-Binding Written Agreements.	121
	iii. Binding Written Agreements.	122
	b. Drafting the Agreement	122
	c. Content of the Agreement	123
	3. Closing Statement and Termination	124
	4. Evaluations	126
	5. Post-Mediation Activities	126
III.	The Separate Meetings	126
	A. Definition	126
	B. Purpose	127
	C. Confidentiality in Separate Meetings	128
	D. When Separate Meetings Should Be Called	129
	E. Separate Meetings and Physical Space	130
	F. How Dynamics Change in Separate Meetings	131
	G. When to End Separate Meetings	131
	1. Duration of Separate Meetings	131
	2. Calling and Managing Separate Meetings	132
	3. Balancing the Duration of Separate Meetings	132
	H. The Separate Meeting Transitions	133
	1. Breaking Into Separate Meetings Transition	133
	2. Commencing a Separate Meeting Transition	133
	3. Ending a Separate Meeting Transition	133
	4. Resuming the Joint Session Transition	134
	I. Potential Dangers with Separate Meetings and Ways of	
	Handling Them	134
IV.	Exercises	135

CONTENTS xv

Five	· Assisting the Communication Process	137
I.	Introduction	137
II.	Communication and Culture	138
III.	Basic Issues in Communication	140
	A. Encoding and Decoding Messages	140
	B. Professional Terminology	141
	C. Experiences, Behavior, and Affect	141
IV.	Communication Style and Terminology	142
V.	Non-Verbal Communication in Mediation	143
	A. Body Language and Visuals	143
	B. Vocals	145
	C. The Mediator's Role in Relation to Visuals and Vocals	146
	D. The Mediator's Own Non-Verbal Communication	146
VI.	Effective Listening	147
	A. Causes of Ineffective Listening	148
	B. Listening Effectively	148
VII.	Elements of Active Listening	148
	A. Detracting from Effective Listening	149
VIII.	Communication in Telephone Mediations	150
IX.	Reframing	152
	A. Reframing Defined	152
	1. A Note on the Similarity Between Reframing and	
	the Design of Jokes	153
	B. Functions and Examples of Reframing	154
	C. Potential Problems with Reframing	155
X.	Appropriate Questioning	156
	A. Introduction	156
	B. The Types of Questions	157
	1. Open Questions	157
	2. Focused Questions	157
	3. Closed Questions	157
	4. Clarifying Questions	157
	5. Reflective Questions	158
	6. Probing Questions	158
	7. Leading Questions	158
	8. Cross-Examining Questions	158
	9. Hypothetical Questions	159
	10. Disarming/Distracting Questions	159
	11. Rhetorical Questions	159
	12. Suggestive Questions	159
	C. Choosing the Appropriate Question	159
	1. Use Questions Judiciously	159
	2. The Hypothetical Question	160
	3. Empathic Versus Probing Questioning	160

xvi CONTENTS

XI.	Mediators' Tools to Promote Effective Communication	161
	A. Reiterating	161
	B. Paraphrasing	162
	C. Summarizing	162
	D. Note-Taking	164
XII.	Exercises	164
Six ·	Managing Conflict from Crisis to Opportunity	167
I.	Benefits of Conflict	167
II.	Productive vs. Unproductive Conflict	170
	A. Identifying and Encouraging Productive Conflict	171
	1. Flexible	171
	2. Recognition of Others' Needs and Interests	172
	B. Identifying and Discouraging Unproductive Conflict	172
	1. Personal Attacks	172
	a. Criticizing	173
	b. Stonewalling	173
	c. Contempt	175
	d. Defensiveness	176
	2. Over-Competitiveness	177
	3. Issue Proliferation	178
III.	Conflict Style	179
	A. Introduction	179
	B. The Styles	180
	1. Competing—"My Way or the Highway."	180
	a. Common Tactics	180
	b. Working with This Style	181
	2. Avoiding—"I'll Think About it Tomorrow."	182
	a. Common Tactics	182
	b. Working with This Style	183
	3. Compromising—"Half a Loaf Is Better Than None."	183
	a. Common Tactics	183
	b. Working with This Style	184
	4. Accommodating—"I Am Happy to Oblige."	185
	a. Common Tactics	185
	b. Working with This Style	185
	5. Collaborating—"Two Heads Are Better Than One."	186
	a. Common Tactics	187
	b. Working with This Style	187
IV.	The Path of the Storm	188
	A. Introduction	188
	B. The Escalation Stages	189

CONTENTS	xvii

Inciting Incident	189
2. Progressive Complication	190
3. Crisis	190
4. Climax	191
5. Resolution	192
C. Complications that Occur During Conflict Escalation	192
1. Light Tactics Give Way to Heavy Tactics	193
2. Issue Proliferation	194
3. Sweeping Generalizations	195
4. Increased Commitment	195
5. Proliferation of Parties	196
D. Other Factors Contributing to Conflict Escalation	196
1. Attribution Distortions	196
2. Face-Saving	198
E. Factors Contributing to Conflict De-Escalation	200
1. Encouraging Contact and Communication	201
2. Initiating De-Escalatory Cycles	202
3. Generating Optimism	202
4. Diagnosing the Dispute	203
F. Who Are the Parties to the Conflict?	203
G. Why Are the Parties in Conflict?	204
1. Relationship Conflicts	204
2. Data Conflicts	205
3. Interest Conflicts	205
4. Structural Conflicts	205
5. Value Conflicts	205
V. Exercises	206
Seven · Facilitating the Negotiations	207
I. The Mediator's Role in Negotiations	207
A. The Negotiation Expert	207
B. Common Negotiating Mistakes	208
C. Many People Are Ineffective Negotiators	208
D. The Negotiator's Dilemma: Creating and Claiming Value	209
II. Assisting in Preparing for Negotiation	211
A. Nature and Importance of Preparation in Negotiation	211
B. Setting the Stage—Gathering Information	212
C. The Parties' Interests	213
1. The Power of Uncovering Interests	213
2. The Process of Understanding Each Other's Interests	215
a. Change the Parties' Point of View	215
b. Role Reversal	215

xviii CONTENTS

	3. Sorting and Prioritizing Interests	216
	a. Identifying Common Ground	216
	b. Identifying Divergent Interests	217
	i. Different Valuations.	218
	ii. Different Expectations.	218
	iii. Different Risk Attitudes.	218
	iv. Different Time Preferences.	218
	v. Different Capabilities.	219
	D. Trading on Divergent Interests	219
	E. The Parties' Alternatives	219
	1. BATNA—Negotiating With the Lights On	219
	2. Mediator's Role in Assessing BATNA	220
	3. Relationship Between BATNA and Reservation Point	221
	4. The Other Party's BATNA	222
	5. BATNA in Litigated Matters	222
	a. The Decision to Go to Trial	222
	b. Calculating Expected Value	223
	c. Bias in Calculating Expected Value	226
	d. Other Factors that Affect Expected Value	227
	i. Time Value of Money.	227
	ii. Other Costs.	228
	iii. Benefits of Trial.	229
	e. Conclusion	229
	F. Identifying Objective Standards	229
	G. Generating Options	231
III.	Assisting the Negotiation Process	232
	A. Orientation and Positioning	232
	1. Orientation	232
	2. Positioning	233
	a. Overview	233
	b. Assisting the Parties in Formulating Opening Offers	234
	i. High/Soft or Low/Soft Offers.	234
	ii. Reasonable/Firm Offers.	235
	iii. High/Low Firm Offers.	235
	iv. Integrative Offers.	236
	c. Understanding the Other Side's Initial Offer	236
	B. Argumentation	237
	1. Overview	237
	2. Managing the Rule of Reciprocity	237
	a. Social Foundations of the Rule	238
	b. How the Rule Works	239
	c. How Mediators Can Manage the Rule	240
	3. Managing the Pattern of Concessions	242
	a. Planning the Concessions	242
	0	

CONTENTS	X1X
CONTENTS	AIA

i. Opening Point.	243
ii. Reservation Point.	244
iii. Target Point.	247
b. Reciprocity of Concessions	247
c. Concessions Are Communication	249
i. Magnitude of Concessions.	249
ii. Timing of Concessions.	250
d. Record of Concessions	250
4. Responding to and Packaging Offers	251
a. Provide a Rationale for the Offer Before Making the Offer	251
b. Emphasize Areas of Agreement by Communicating	
Them First	251
c. Acknowledge Agreement at the Level of Principle	252
5. Dealing With the Tactics of Positional Bargaining	252
a. The Tactics	252
i. Intimidation and Threats.	252
ii. Stonewalling.	252
iii. Phantom Trades.	252
iv. Good Cop/Bad Cop.	253
v. Claiming Lack of Authority.	253
b. Possible Interventions	253
i. Educate.	253
ii. Anticipate.	253
iii. Identify.	254
iv. Enforce.	254
6. Mediator's Role in Promoting Interest-Based Bargaining	254
a. Shifting Focus from Positions to Interests	254
b. Considering Creative Settlement Options	255
c. Brainstorming	256
d. Eliciting Participants' Solutions	257
7. Special Techniques in Negotiation	257
a. Reframing to Enhance Negotiability	258
b. Shifting Between Principle and Detail	258
c. Making More than One Offer Simultaneously	259
d. Linked Bargaining	259
e. Accommodating Future Contingencies	260
C. Emergence and Crisis	261
1. Crossing the Last Gap	261
2. Dealing With Impasses	264
a. Possible Interventions for Substantive Impasses	265
b. Potential Interventions for Procedural Impasses	265
c. Potential Interventions for Emotional Impasses	266
D. Agreement or Final Breakdown	266
Exercises	267

IV.

XX CONTENTS

Eigh	t · Encouraging Settlement	269
I.	Introduction	269
II.	Sources of Mediator Power and Influence	269
III.	Categories of Encouragement to Settle	270
	A. Providing Information	271
	B. Expressing an Opinion	272
	C. Advising	272
	D. Being Critical or Judgmental	274
	E. Acting as the Agent of Reality	275
	1. Weaknesses	276
	2. Quality of Agreement	277
IV.	Methods of Encouraging Settlement	277
	A. Modes of Encouraging Settlement	277
	1. Verbal	278
	2. Non-Verbal	278
	3. Procedural and Structural	278
	4. Environmental	278
	5. Visual	278
	B. Styles of Encouraging Settlement	279
	C. Using Power to Encourage Settlement: Some Illustrations	280
V.	Dangers in Encouraging Settlement	282
	A. Dangers Relating to the Parties and Their Agreement	282
	B. Dangers Relating to the Mediator	283
	C. Dangers Relating to the System of Mediation	283
VI.	Creating the Balance	283
VII.	Exercises	285
Nine	· Managing Power in Mediation	287
I.	Introduction	287
II.	What Is Negotiation Power and Why Does It Matter?	288
	A. Negotiation Power Defined	288
	B. Why Does Being Attentive to Negotiating Power Matter?	289
	C. Types of Negotiation Power	290
	1. Substantive Power	290
	a. Positive Leverage	291
	b. Normative Leverage	291
	c. Negative Leverage	291
	d. Best Alternative to a Negotiated Agreement (BATNA)	292
	e. Asymmetry of Information	292
	2. Personal Power	293
	3. Relationship Power	293
III.	Mediator Interventions to Manage Power	293

CONTENTS	xxi

A. Introduction	293
B. General Interventions	294
1. Mediator Presence	294
2. Educating the Parties About Mediation	295
3. Modeling Appropriate Communication and Behavior	295
C. Balancing Substantive Power	295
1. Encourage Parties to Share Information	295
2. Help Parties Objectively Explore Their BATNA	296
3. Assist Parties in Understanding Their Interests and the	
Interests of Other Parties	297
4. Recommend the Use of Experts, Like Lawyers, Accountants,	
Financial Advisors, or Other Expert Sources of Information	297
5. Provide Legal Information to Parties	298
6. Provide an Evaluation	299
D. Managing Personal Power	300
1. Ensure That Each Party Has Their Say	300
2. Paraphrase and Summarize Frequently	300
3. Encourage Persistence and Patience	300
E. Managing Relationship Power	301
1. Assure Party Safety	301
2. Tailor Mediation and Communication Guidelines to Manage	
Undue Power Imbalances	302
3. Use Separate Meetings and Breaks Liberally	302
F. Dangers in Managing Power Imbalances	303
IV. Exercises	303
Ten · Variations in the Mediation Process	305
I. Introduction	305
II. Multiple Meetings	305
III. Shuttle Mediation	306
A. Shuttle Mediation Defined	306
B. Differences in Shuttle Mediation	307
C. When to Use Shuttle Mediation	307
D. Practical Considerations	308
E. Some Potential Drawbacks and Dangers in Shuttle Mediation	309
F. Ways of Improving Shuttle Mediation	311
IV. Using More than One Mediator	311
A. When to Adopt Co-Mediation	311
B. Creating a Favorable Environment in Co-Mediation	312
1. Planning and Organization	312
2. Conduct of the Process	313
3. Using Each Mediator's Expertise	314

xxii CONTENTS

	4. Avoiding Bias and Partiality	314
	5. Staying Together	314
	6. Improving the Communications in Co-Mediation	315
	7. Facilitating the Negotiations in Co-Mediation	315
	C. Avoiding Traps in Co-Mediation	316
	1. Good Cop-Bad Cop Routine	316
	2. Modeling Inequality or Lack of Teamwork	316
	3. Appointing Incompatible Personalities	316
	D. Preparation for Co-Mediation	317
	E. Debriefing by Co-Mediators	317
V.	Telephone Mediation	318
VI.	Med-Arb	320
VII.	Other Variations in the Mediation Process	321
	A. Alternating Venues	321
	B. Variations in Separate Meetings	321
	C. Involving Support Persons	322
	D. Consultation with Outside Parties Before Ratifying Agreement	323
VIII.	Exercises	323
Eleve	n · Virtual Mediation	325
I.	Introduction to Online Dispute Resolution	325
	Virtual Mediation	326
III.	The Advantages of Using Virtual Mediation	326
	A. Decreased Demands on Time and Money	326
	B. Ease of Attendance and Enhanced Participation	327
	C. Heightened Ability to Manage Negotiation Power Among Parties	327
	D. High Efficacy	328
IV.	The Disadvantages of Using Virtual Mediation	329
	A. Diminished Non-Verbal Communication	330
	B. Increased Difficulty in Building Trust and Rapport	330
	C. Risk of Technical and Practical Problems	331
	D. Videoconferencing Fatigue	331
	E. Confidentiality and Privacy Concerns	332
	F. Perceptions of Diminished Procedural Justice	332
V.	Best Practices in Conducting Virtual Mediation	334
	A. General Considerations	334
	B. Use of Videoconferencing Platform Features	335
	C. Protect Confidentiality	336
VI.	Exercises	337
Twelv	ve · Use of Evaluation in Mediation	339
	Introduction	339
	Benefits of Evaluative Mediation	340

	A. Provides Parties With a Better Understanding of the Issue(s)	341
	B. Provides Objective Insight	341
	C. Especially Beneficial for Unrepresented Parties	341
	D. May Provide a More Cathartic Experience	342
III.	Dangers of Evaluative Mediation	342
	A. Risk of the Mediator Being Perceived as Having Lost Neutrality	343
	B. May Discourage Interest-Based Problem Solving	343
	C. Threatens Party Self-Determination	343
	D. Evaluations Can Be Flawed	344
IV.	Recommendations for Using Evaluative Mediation	346
	A. Familiarize Yourself with Jurisdictional Variations	346
	B. Use Best Practices in Evaluative Mediation	347
	1. Choose to Evaluate Judiciously	347
	2. Have Relevant Expertise	348
	3. Ask Permission to Evaluate	348
	4. Emphasize That It Is Only Your Opinion	349
	5. Evaluate as Narrowly as Practicable	349
	6. Delay an Evaluation as Long as Possible	350
	7. Provide Evaluations to Parties Privately	350
V.	Conclusion	350
VI.	Exercises	351
Thirt	een · Special Issues in Mediation	353
I.	Introduction	353
II.	Dealing with Violence	353
	A. Policy Issues	354
	B. Screening for Violence	354
	C. Mediator Interventions in Relation to Violence Issues	355
III.	Using Interpreters in Mediation	357
IV.	Dealing with Proposed Settlements "Outside the Range"	358
V.	Dealing with Absent Parties	361
VI.	Involving Children in Mediation	362
VII.	Dealing with Experts in Mediation	364
VIII.	Dealing with Lawyers and Other Professional Advisers	366
	A. Issues for Professional Advisers	366
	B. Degrees of Involvement by Advisers	368
	C. Seating of Advisers	369
	D. Documentation	369
	E. Parties' Initial Statements	370
	F. Accommodating the Need to Be Involved	370
	G. Taking Instructions	370
	H. Assisting Advisers in Modifying Their Advice	371
	I. Using the Advisers as Quasi-Mediators	372

xxiv CONTENTS

IX.	Dealing with Complex Multi-Party Disputes	372
	Dealing with the Walk-Out	374
	Exercises	374
Four	teen · Avoiding Mediator Traps	377
I.	Introduction	377
II.	Unrealistic Expectations	378
	A. The Trap	378
	B. Avoidance Strategies	379
III.	Losing Impartiality	379
	A. The Trap	379
	B. Avoidance Strategies	381
IV.	Dominating the Process	382
	A. The Trap	382
	B. Avoidance Strategies	382
	C. Avoiding Technical Language	383
V.	Losing Control of the Process	383
	A. The Trap	383
	B. Avoidance Strategies	384
	C. The Trap of Allowing Professional Advisers to	
	Dominate the Process	385
VI.	Ignoring Emotions	386
	A. The Trap	386
	B. Avoidance Strategies	386
VII.	Moving to Solutions Too Quickly	387
	A. The Trap	387
	B. Avoidance Strategies	387
VIII.	Pushing the Parties	388
	A. The Trap	388
	B. Avoidance Strategies	389
	C. Distorting the Parties' Views During Shuttle Mediation	390
IX.	Assuming a Differing Professional Role	390
	A. The Trap	390
	B. Avoidance Strategies	391
Χ.	Being Unprepared	391
	A. The Trap	391
	B. Avoidance Strategies	392
XI.	Allowing the Agreement to Be Left Undocumented	392
	A. The Trap	392
	B. Avoidance Strategies	392
XII.	Ignoring External Parties	393
	A. The Trap	393
*****	B. Avoidance Strategies	393
XIII.	Exercises	394

CONTENTS XXV

Fifteen · Becoming a Mediator, Careers in Mediation, and	
Establishing a Private Mediation Practice	395
I. Introduction	395
II. Developing Mediator Credentials	396
A. Training and Qualifications	396
1. Where Training Is Available	396
a. Community Mediation Centers	396
b. Professional Mediation and Dispute-Resolution Organizations	396
c. Private Mediators	397
d. Colleges and Universities	397
2. Basic Mediation Training	397
3. Advanced Training	398
4. Making the Decision	399
B. Licensure, Certification, and Accreditation	400
C. Gaining Experience as a Mediator	403
 Formal Avenues for Developing Experience 	403
2. Experience Through Co-Mediation	403
3. Reflective Practice	403
4. Informal Methods for Developing Mediation Experience	404
III. Employment Opportunities	404
A. Opportunities for Salaried Positions	404
1. Court-Connected Programs	404
2. State and Federal Agencies	405
3. Community Mediation Centers	405
4. Colleges and Universities	405
5. Corporate	406
6. Private Dispute-Resolution Companies	406
B. Private Practice	407
C. Mediation-Related Employment	407
1. Teaching	407
2. Associations and Organizations	407
3. Consulting	408
D. Developing Frontiers	408
1. Victim-Offender Mediation	408
2. Private International Mediation	409
3. Online Mediation	409
IV. Marketing Your Private Mediation Practice	410
A. Introduction	410
B. Mediation Is a Service Industry	412
1. Characteristics of Successful Mediators	412
a. People	412
b. Passion	412
c. Excellence	413
d. Authenticity	413

xxvi CONTENTS

2. Importance of Reputation	413
C. Determine Your Desired Level of Practice	414
1. Volunteer Practice	414
2. Part-Time Practice	415
3. Full-Time Practice	415
4. Premier Practice	416
D. Developing a Marketing Plan	416
1. Identifying the Target Market	416
a. Market Segmentation	416
b. Market Niche	417
2. Include Measurable Business Goals	417
3. Strategies for Reaching the Target Market	418
a. Professional Networks	418
i. Internal Networks.	418
ii. External Networks.	419
b. Speaking Engagements	420
c. Training and Teaching	421
d. Publishing	421
e. Website and Social Media	422
V. Practical Business Considerations	422
A. Meeting Facilities	422
B. Getting Paid	423
C. Business Entity	424
D. Professional Indemnity Insurance	424
E. Client Satisfaction Surveys	424
F. Conclusion	424
VI. Exercises	425
Appendix One · Standard Forms for Mediation Practice	427
Appendix Two · Forms Related to the Agreement to Mediate	433
Appendix Three · Mediated Agreements	439
Appendix Four · Reframing	447
Appendix Five · Guidelines for Lawyers Representing	
Clients in Mediation	449
Appendix Six · Evaluation	451
Appendix Seven · Mediator's Opening Statement Checklist	455
Appendix Eight · Pre-Mediation Conference Preparation Form	457
Appendix Nine A · Expected Value Calculation Form—Plaintiff	459
Appendix Nine B · Expected Value Calculation Form—Defendant	461
Appendix Ten · Ethical Standards	463
Index	471

About the Authors

Laurence J. Boulle, B.A., LL.B., LL.M., Ph.D., has worked at universities in Africa, Europe, North America, the Pacific, and Australasia. He was William J. Cook fellow at the University of Michigan Law School in Ann Arbor. He is currently Bell Wiese Professor of Legal Ethics, University of Newcastle, and Adjunct Professor in the School of Law, Bond University. He is nationally accredited as a Mediator and as a Family Dispute Resolution Practitioner and has practiced in family, franchising, leasing, workplace, native title, and organizational mediation. He is former chair of the Mediator Standards Board in Australia, and his books on mediation and dispute resolution have been published in seven countries.

Michael T. Colatrella Jr., J.D., LL.M., is a Professor of Law at University of the Pacific, McGeorge School of Law, and former Director of the Southern Methodist University's Center for Dispute Resolution and Conflict Management in Plano, Texas. He teaches and writes in the areas of Alternative Dispute Resolution, Mediation, Negotiation, Lawyering Skills, Legal Education, and Leadership. Professor Colatrella is a court-approved mediator in California, Texas, New Jersey, and Kansas, practicing in the areas of workplace, commercial, consumer fraud, and personal injury mediation. He has consulted for Fortune 500 companies and governments across the United States and abroad.

Anthony P. Picchioni, Ph.D., holds a Ph.D. from UNT in counseling. For the last 20 years he has been a professor at SMU in Dallas as well as an educational consultant for Baylor University Medical Center, the academic hospital in Dallas. Dr. Picchioni created two master's-level programs at SMU, one in dispute resolution and another in clinical counseling, and has served as chair of the Human Development Department for eighteen years. He has written and published extensively in the fields of counseling, mediation, conflict management, and health care. He has chaired the Texas licensing board for counseling and the ethics review board. He has also consulted internationally for Fortune 500 and Fortune 50 companies around the world. He and his wife (Debby) live in Plano, Texas.

Acknowledgments

Laurence Boulle would like to thank colleagues at the Dispute Resolution Centre, Bond University, in particular, John Wade, Pat Cavanagh, Libby Taylor, Jane Hobler, and Cheryl Hensel, for their support, as well as the many students and professionals whose observations, insights, and feedback have always made teaching mediation skills and techniques such a delight. Particular thanks go to his student research assistants on this project, Yvette Zegenhagen, Joshua Underhill, and Marian Pond. Finally, gratitude for assistance of both the mediational and non-mediational varieties goes to Nadja, Mark, Sarah, Philippa, and Jono.

Michael Colatrella and Anthony Picchioni would like to thank their colleagues at the Center for Dispute Resolution and Conflict Management, Southern Methodist University, in particular, Robert Barner, Ph.D.; Thomas Cinti, J.D., M.S.; Thomas Hartsell, J.D.; Joel Goldman, J.D.; Jeffrey Kreisberg Ph.D.; and John Wade, LL.B, LL.M. Particular thanks also go to Jacqueline Field and Kay Barclay for administrative support, to Ava Hall and Deborah Jean Schmidt for research assistance, and to Carlos Martín. Additional thanks go to students who volunteered their time to proofread various sections of this book: Enrique Arroyave, Brandi Colón, Kristyne Evanoski, Stacy M. Gibson, Ellen Lee, Robin T. Mathew, Allison Morrow, and Bridget A. Okpa. Finally, special thanks go to Jean Mary Shanley, J.D., for her support, advice, and editing suggestions that have greatly contributed to this book.

For the second edition, the authors wish to thank Kristina Lee and Heather Mills, McGeorge School of Law students, whose diligence in research and proofing contributed significantly to this edition.

