

**FAMILY MEDIATION:
THEORY AND PRACTICE**

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FAMILY MEDIATION: THEORY AND PRACTICE

Second Edition

Jane C. Murphy

*Laurence M. Katz Professor of Law
University of Baltimore School of Law*

Robert Rubinson

*Professor of Law
Director of Clinical Education
University of Baltimore School of Law*



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630 Central Ave., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
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MATTHEW  BENDER

Dedications

To Chris, Brendan, Katie, Margaret, Cat, and Gracie, with thanks for your love and patience — JCM

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Preface to the Second Edition

The second edition of this book updates and expands upon the material in the first edition. We have made substantial changes, both in response to the rapidly changing world of family dispute resolution and in response to feedback from the many students and faculty who have used our first edition.

While mediation has spread as a means to resolve virtually all types of disputes, in no area has this been more apparent — or more controversial — than in family law. Mediation is part of a paradigm shift in family dispute resolution that is now firmly entrenched. Legislatures and courts in numerous jurisdictions have adopted rules and statutes that encourage and sometimes mandate that family law cases be mediated and set forth procedures under which such mediations are to take place. Many thousands of family mediations happen every day. More and more private family mediators are starting to practice. As a result, mediation and family law are increasingly intertwined in a web of procedures and practices that has generated a new, distinct subject: “family mediation.” Knowledge of mediation or knowledge of family law no longer suffices for a modern family lawyer. Family mediation melds the unique characteristics and challenges of family law with the unique characteristics and challenges of mediation. The many issues of practice and policy this implicates are the subject of this book.

In addition to expanding and updating the prior material in the first edition, this new edition explores a range of recent developments that have arisen since the publication of the first edition. One is how family lawyers are increasingly participating in “collaborative” or “cooperative” law — processes which, without a mediator, are designed to approach resolving family disputes in a constructive, non-adversarial way. Another development is the expanding use of different types of dispute resolution besides mediation, such as arbitration, or of “hybrid” processes that include some combination of ADR processes. We have also added a chapter on pro se parties who now represent the majority of family law litigants in 21st century courts. The chapter explores the profound implications of this influx of large numbers of unrepresented parties on the role of mediators and the mediation process. One impact of this development is a broader endorsement of the educating role of the mediator. In response to this and to feedback from users of the book, we have also included sections that provide an overview of the legal norms that might be helpful in some mediation contexts. Finally, we address how the many changes in family composition over the last several years, including the impact of the remarkable spread of the legal recognition of same-sex marriage, has or will change family mediation.

As we noted in the first edition, we continue to be guided by a number of core principles in writing this text. First, while mediation can be extraordinarily effective, family mediation — like any activity — can be done well or poorly, can be appropriate or inappropriate, can be effective or ineffective. We do not shy away from asking these difficult questions. Second, new family lawyers might or might not find themselves mediating, but all new family lawyers will represent clients in mediation. We thus include materials on representing clients in mediation. Third, we do not assume a perfect world, where parties have resources to hire attorneys and a mediator with abundant time to facilitate a resolution. Family mediation is contextual not only in terms of “facts” but also in terms of where and how it is practiced. We do our best to reflect this in the text. Fourth, we recognize that mediation can sometimes pose serious risks for participants, and we offer different views of when this might be the case and how it can be dealt with. Finally, family mediation is interdisciplinary, and thus experts in family dynamics and child development have important things to teach all of us. We include a sampling of their conclusions in the text.

We welcome readers to an exciting and challenging subject that is at the forefront of how we, as lawyers and as a society, approach resolving the most intimate and, in many respects, consequential of disputes.

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