

# Table of Contents

Foreword.....	v
Preface .....	ix
Acknowledgements .....	xi

## **1 Introduction — Mediation Representation in Complex**

<b>Situations: Advocate, Ally or Both? .....</b>	<b>1</b>
1. Mediation in a Nutshell.....	3
2. History of the Mediation Movement.....	8
3. Representation in Mediation.....	9
(a) Opportunity for Client Voice .....	11
(b) Preparation.....	12
4. Complexity .....	14
5. Conclusion .....	16

## **PART I — SELF-REPRESENTED PARTIES**

### **2 Advocates and Self-represented Persons — What to Do in**

<b>Mediations with Asymmetrical Representation .....</b>	<b>19</b>
1. Preparation.....	22
(a) Preparing Materials .....	23
(b) Initial Communication.....	25
(c) Preparing Clients .....	26
2. The Mediation Session.....	27
(a) Fairness in Mixed Representation Mediation .....	28
(b) Zealous Advocacy for Clients .....	31
3. Agreement .....	33
(a) Informed Consent.....	33
(b) Enforcement and Compliance Issues .....	34
(c) Drafting: An Advocate’s Role? .....	36
4. Conclusion .....	37

### **3 Unbundled Legal Services and the Self-Represented Person in**

<b>Mediation .....</b>	<b>39</b>
1. What Are Unbundled Legal Services?.....	41
(a) Access to Justice.....	43
(b) New Business Models .....	45
2. Recent Research and Reports on Unbundled Legal Services .....	46

3.	How Can Unbundled Legal Services Support Effective Mediation Advocacy? .....	47
	(a) Representation in Mediation Broadly .....	48
	(b) Unbundled Legal Services in Mediation.....	49
4.	An Unbundling Process Framework .....	51
5.	Special Topics.....	57
	(a) Support to Select the Mediator .....	57
	(b) Mediation Advocacy as Coach or Representative.....	58
6.	Conclusion .....	59

**4 The Promise and Perils of Mediation: The Impact of Self-Represented Litigants on the Ethics and Practice of Mediation..... 61**

1.	The Rise of Self-Representation.....	62
2.	The Promise of Mediation .....	64
3.	The Perils of Mediation .....	69
4.	Self-Represented Litigants and Opposing Counsel.....	70
5.	The Path Forward .....	73
6.	Lawyer as Mediator.....	77
7.	Conclusion .....	84

**PART II — PARTIES WITH DISABILITIES**

**5 Design, Disability and Accommodation: Considerations for Mediation ..... 87**

1.	Preparation.....	91
	(a) Disclosure of Disability .....	91
	(b) Capacity to Mediate .....	93
2.	The Mediation Session.....	96
	(a) Barriers to Participation .....	96
	(b) The Need for Accommodation.....	98
	(c) Types of Accommodation .....	100
	(i) <i>Timing of the Mediation and Breaks</i> .....	101
	(ii) <i>People Using Service Animals</i> .....	101
	(iii) <i>Support Persons</i> .....	102
3.	Agreement .....	103
	(a) Capacity, Duress, and Undue Influence .....	104
	(b) Format of the Agreement .....	105
4.	Conclusion .....	106

**6 Advocating Accommodations: Specific Considerations from a Disability-by-Disability Perspective..... 107**

TABLE OF CONTENTS

xv

- 1. Accommodating the Needs of Clients with Hearing Loss ..... 108
- 2. Accommodating the Needs of Clients with Vision Disabilities..... 114
- 3. Accommodating the Needs of Clients with Intellectual Disabilities..... 118
- 4. Accommodating the Needs of Clients with Mental Health Disabilities ..... 120
- 5. Accommodating the Needs of Clients with Physical and Mobility Disabilities..... 123
- 6. Accommodating the Needs of Clients with Communication Disabilities ..... 125
- 7. Accommodating the Needs of Clients with Autism ..... 127
- 8. Accommodating the Needs of Clients with Learning Disabilities in Mediation..... 130
- 9. Conclusion — Towards Universal Accessibility..... 131

**7 Dispute Resolution, Disability and Democratic Values: An Examination of Mediation Through a Critical Disability Lens ..... 133**

- 1. Defining and Conceptualizing Disability and Critical Disability Theory..... 137
- 2. Analysis of Traditional Critiques of Mediation Through a Critical Disability Lens ..... 140
  - (a) Privacy ..... 141
  - (b) Informality ..... 143
  - (c) Protection of Vulnerable Parties ..... 146
- 3. A Democratic Values-based Defense of Mediation for People with Disabilities..... 149
  - (a) Participation ..... 151
  - (b) Personal Autonomy ..... 153
  - (c) Citizenship..... 155
- 4. Conclusion — Where Does This Lead Us? ..... 158

**PART III — MULTI-PARTY MEDIATIONS**

**8 When Complexity Multiplies — The Multi-Party Environment in Complex Mediations ..... 163**

- 1. Preparation..... 165
  - (a) Selecting a Mediator or Team of Mediators..... 166
  - (b) Determining a Best Alternative to a Negotiated Agreement (BATNA) ..... 167
  - (c) Charting Relationships ..... 169

2.	The Mediation Session.....	170
	(a) Leadership.....	171
	(b) Cooperation and Coordination.....	171
	(c) Coalition Development.....	172
3.	Agreement.....	175
	(a) Create Value and Claim It.....	175
	(b) Know the Rules.....	175
	(c) Develop a Communication Strategy.....	176
4.	Conclusion.....	176
<b>9</b>	<b>Mediation Advocacy in Collective Bargaining.....</b>	<b>177</b>
1.	Introduction.....	177
2.	Unique Features of Collective Bargaining.....	179
3.	Case Study — ACME Utility Co.....	180
	(a) Best Practice — Choosing a Mediator.....	181
	(b) Best Practice — Preparation.....	182
	(c) Best Practice — Negotiating the Issues.....	184
	(d) Best Practice — Impasse.....	186
	(e) Best Practice — Wages.....	188
4.	Final Thoughts on Mediation Advocacy in Collective Bargaining.....	190
	(a) “Horse Trading”.....	190
	(b) Letting the Mediator off the Hook Regarding Content.....	191
	(c) Letting the Mediator off the Hook Regarding Process.....	191
5.	Conclusion.....	191
<b>10</b>	<b>Ethical Advocacy in Multi-Party Mediation.....</b>	<b>193</b>
1.	What do We Mean by “Ethical”?.....	198
2.	Codes of Conduct in Mediation.....	200
3.	Unique Features of Multi-Party Mediation.....	206
4.	Advocacy in Multi-Party Mediation.....	209
5.	Conclusion.....	216
<b>Index</b>	.....	<b>219</b>