

# 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<br>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<br>Bargaining..... | 190        |
|              | (a) “Horse Trading”.....  | 190        |
|              | (b) Letting the Mediator off the Hook Regarding<br>Content.....       | 191        |
|              | (c) Letting the Mediator off the Hook Regarding<br>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> |