

# **How Mediation Works**

Theory, Research, and Practice

*How Mediation Works* will be the “go to” book for people who want to better resolve their own conflicts, as well as for professional mediators to improve their craft. Easy to read, this book will prepare you to maximize success in a mediation by teaching you how mediation works from the inside. I recommend *How Mediation Works* to law students, mediation trainees, experienced mediators, collaborative professionals and others who want to get their skills to the next level, and to my clients who need to resolve conflict in their lives. I am proud to have *How Mediation Works* be part of my office’s Client Library and a recommended book for those seeking my mediation training.

– Forrest S. Mosten, *Adjunct Professor,  
UCLA School of Law; mediator; mediation trainer;  
author of Mediation Career Guide (2001),  
Complete Guide to Mediation, 2nd Edition (2015)*

As a seasoned civil trial lawyer who has embraced, when conducted competently, mediation as the most effective alternative dispute resolution vehicle, I commend *How Mediation Works* to all civil trial lawyers and mediators – seasoned and neophytes alike. The authors have dedicated a significant portion of their professional lives to teaching mediation and negotiation, and should be applauded for reducing their expertise to a writing that will become the bible for all who find themselves in the world of mediation. The book accurately delineates the roles of the mediator, lawyers and litigants in a cogent, practical, and easy-to-read fashion. It is, in my opinion, a must-read for all of us who truly aspire to successfully participate in the mediation process.

– Thomas A. Demetrio, *Founding Partner,  
Corboy and Demetrio, Chicago, IL.  
Past President, Chicago Bar Association,  
Illinois Trial Lawyers Association*

The role played by a manager in resolving workplace conflict, whether between peers or subordinates, bears a close relationship to the mediation process described in *How Mediation Works*. Like a mediator, the manager seeks to facilitate an agreement that contributes to each party’s satisfaction and, in turn, strengthens their relationship. The authors of *How Mediation Works* – each with decades of hands-on and research-guided expertise in achieving these ends – explain with refreshing clarity the processes that enable conflicts to be positively resolved. For these reasons, the advice provided (in plain English, not “legalize”) in *How Mediation Works* should be required reading for both managers and management students.

– Debra L. Shapiro, *Clarice Smith  
Professor of Management & Organization,  
Robert H. Smith School of Business, University of Maryland;  
President, Academy of Management (2015–2016)*

In this clearly written guide to mediation, the authors present central concepts of dispute resolution with refreshing simplicity, accompanied by a sound theoretical approach based on decades of research and mediation practice. Disputants as well as mediators, new and experienced alike, will find this book valuable reading.

– William Ury, co-author, *Getting to Yes* (world-wide best-seller on negotiation). Co-founder, Harvard Program on Negotiation. Mediator of conflicts ranging from Kentucky coal mine strikes to ethnic wars in the Middle East, the Balkans, and the former Soviet Union.

*How Mediation Works* is a short, comprehensive, well-written, and easily accessible book on mediation for both practitioners and students. It covers a wide range of mediation contexts, including family, neighborhood, employment, commercial, and environmental disputes. *How Mediation Works* includes chapters on dispute resolution, the mediation process, mediation techniques, impasse resolution, and how to get into the field of mediation. These will be of interest to both experienced and new practitioners. In addition, *How Mediation Works* is well suited as a textbook for both ADR courses and mediation training programs. Thanks to the authors for providing such a useful book. I intend to add it to my list of recommended books immediately.

– Zena D. Zumeta, Mediator and mediation trainer, Ann Arbor, MI. President, Mediation Training & Consultation Institute and The Collaborative Workplace. Former president, Academy of Family Mediators

*How Mediation Works* is a first-rate book by authors with impressive credentials as mediators and mediation researchers. In my current role as a full-time mediator, I was particularly impressed by their recognition that the mediator's function is not necessarily to assist the disputants in reaching settlement, but rather to aid them in determining whether the best agreement available in mediation – which the mediator will assist in developing – sufficiently satisfies their interests to be acceptable, when compared to the best outcome reasonably to be expected in litigation. Viewed from this perspective, the mediator is not a deal-maker, but a helper to each party. The ultimate choice whether or not to settle is up to them, and the mediator who has done all he can to assist each in making that choice has fully satisfied his obligation – regardless of whether or not they choose to settle. Settlement, in other words, is not the criterion of successful mediation.

– Hon. Morton Denlow, Attorney 1972–1996; Magistrate Judge, U.S. District Ct. (ND IL), 1996–2012 (ret.); Mediator, Judicial Arbitration and Mediation Service (JAMS) 2012.

Resolution Systems Institute values straightforward, technically accurate information about mediation in our work to develop, administer and evaluate mediation programs. This is especially important in cases such as mortgage foreclosure, child protection and small claims, where mediation promotes access to justice for participants. *How Mediation Works* provides a valuable new source of that kind of information.

– *Susan M. Yates, Mediator and Executive Director,  
Resolution Systems Institute, Chicago, IL.*

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# About the Authors

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**Jeanne M. Brett** is the DeWitt W. Buchanan, Jr. Distinguished Professor of Dispute Resolution and Organizations, Kellogg School of Management, Northwestern University, Evanston, IL. Brett's research has focused on mediation, mediator behavior, and disputant satisfaction with mediation compared to other dispute resolution processes. She has also studied how culture affects negotiation and dispute resolution. She is the author of numerous journal articles, negotiation teaching materials, and award winning books: *Negotiating Globally*, now in its third edition, and *Getting Disputes Resolved* with William Ury and Stephen Goldberg. She initiated Kellogg's MBA courses in negotiations in 1981, and in cross-cultural negotiations in 1994. She was a founder of Kellogg's Dispute Resolution Research Center in 1986, and Center director, 1986–2016.

**Stephen B. Goldberg** is Professor of Law Emeritus at the Pritzker School of Law, Northwestern University. He has served as a mediator since 1980, mediating hundreds of disputes, including disputes between neighbors, disputes between divorcing spouses, employer-employee disputes, labor-management disputes, and domestic and international commercial disputes with billions of dollars at stake. Professor Goldberg began teaching mediation to law students in 1981, and has conducted mediation training classes for hundreds of beginning mediators, as well as for advocates in mediation. He is the founder and president of Mediation

Research & Education Project, Inc., a not-for-profit corporation that promotes mediation of labor-management disputes, and trains disputing parties on how to be successful in mediation. Professor Goldberg has published numerous articles on negotiation, mediation, and dispute systems design, as well as the following books – *Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes* (with Frank E. A. Sander, Nancy H. Rogers, and Sarah R. Cole); and *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (with Jeanne M. Brett and William L. Ury).

**Nancy H. Rogers** (author of Chapter 5, *Mediation and the Law*) has practiced, taught, and written in the mediation field for more than 30 years. She is the Emeritus Moritz Chair in Alternative Dispute Resolution at the Ohio State University Moritz College of Law, where she also directs the Program on Law and Leadership. She served as reporter for the Uniform Mediation Act. She is a co-author of a three-volume treatise, *Mediation: Law, Policy & Practice*, which is updated annually and is a database on Westlaw. In addition, she is a co-author of three law school textbooks: *Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes*, *Designing Systems and Processes for Managing Disputes*, and *A Student's Guide to Mediation and the Law*. Her recent article on mediation within divided communities garnered the 2015 CPR Professional Article Award. She was Dean of the Ohio State University Moritz College of Law (2001–2008) and Ohio Attorney General (2008–2009).

# Acknowledgments

Many people provided assistance to us in conceiving and writing *How Mediation Works*. We particularly want to thank Nancy Rogers, who, in addition to contributing the chapter on Mediation and the Law, provided feedback and advice for improvement on every other chapter. Special thanks are also due to Susan Yates, who helped us understand those areas of mediation with which she is more familiar than are we, and who provided both constructive criticism and advice on all aspects of the book. Bill Hobgood suggested that we provide advice to those who are interested in becoming mediators, and Chapter 6 is the result of that wise suggestion. Jessica Nelson helped us immensely with formatting, and Melissa Cryder helped with a myriad of administrative and clerical tasks.

Finally, we wish to thank the anonymous reviewers who helped us in many ways to improve a book that we – wrongly – thought was complete when it went out for review.

# Introduction

**M**ediation is a dispute resolution process in which a neutral third party, who does not have the authority to impose an outcome on disputing parties (as does a judge) seeks to assist them in resolving their dispute.

This book is for people who want to learn more about how mediation works. Some will be *mediation providers* – mediators and would-be mediators. People who are already mediators should find the book useful as a quick review of their role in the mediation process. They may also benefit from the dialogues that illustrate how they might approach, for example, a disputant's unwillingness to make the first offer, or concerns about the confidentiality of mediation. Mediators practicing in the United States will also find the review of mediation and the law in Chapter 5 valuable in ensuring that they act consistently with the law on such matters as the confidentiality of mediation, the mediator's obligation to act impartially, and the preservation of the disputants' free choice whether or not to settle in mediation.

This book is also for judges and arbitrators who seek to mediate some disputes, rather than decide them. Judges and arbitrators may also find the book useful in developing criteria for deciding whether certain disputants should be encouraged to seek a resolution in mediation rather than in court or arbitration.

An important category of readers consists of those who want to learn about how mediation works because they are *mediation users* – those who will or may participate in mediation. Among these are disputants and those who represent disputants in mediation – sometimes lawyers, sometimes people who are not lawyers, but are knowledgeable about the context in which the dispute arises, such as union representatives or human resources personnel. This book provides them with an understanding about what mediators do and why they do it.

Managers, who often find themselves involved in disputes between peers or subordinates, may benefit from the book's advice on facilitating the resolution of disputes. Although

managers are not mediators in the pure sense – mediators do not have authority to impose an outcome on disputes and managers often do – managers will find that they can use many of the mediation techniques here discussed. Managers may also fall into the category of mediation users when their organizations are involved in a dispute with another organization or individual, such as customers or suppliers.

Finally, there is a category of readers – *mediation learners* – who do not have an immediate interest in providing or using mediation, but want to learn about how mediation works because of its growing use to resolve a wide range of disputes.

To address readers with such different reasons for their interest in mediation, we could have written two, if not three, separate books. Instead, we chose to write a single book addressing all these potential readers. We did so because we assumed that not just mediators and would-be mediators, but also mediation users and those curious about mediation would be interested in how mediation works – which is what this book is about.

Because of the variety of audiences for this book, you may find some material that is of direct interest to you and some that will be only indirectly interesting. Skip the latter if you wish, but the book is sufficiently short that you can easily read it all, and in doing so enlarge and deepen your understanding of mediation.

Chapter 1 introduces three different approaches to dispute resolution. A disputing party, in seeking a favorable outcome to a dispute, may rely upon its power (physical, economic, or psychological), its rights (normally based on law or contract), or its interests (needs, wants, concerns). Chapter 2 provides advice to disputing parties on selecting a dispute resolution process suitable for their dispute, pointing out that courts and arbitrators focus solely on rights, while mediation can – and often does – focus primarily on the parties' interests – their needs and concerns – while not ignoring their rights and power.

Chapter 3 focuses on how to make mediation work effectively. It discusses why some disputants and/or their lawyers are reluctant to mediate, and suggests how to address that reluctance. It also addresses the practical aspects of getting started with mediation – selecting a mediator, developing the ground rules for mediation, and many others. Chapter 3 also describes the mediator's role at each step of the mediation process: (1) aiding the parties in discovering their interests and priorities; (2) using those interests and priorities to assist the parties in developing

potential settlements; (3) encouraging the parties to make the best settlement offers possible; and (4) aiding each party in comparing the best agreement available in mediation with the best outcome it can reasonably expect outside mediation.

Chapter 4 turns to the most common difficulties encountered in mediation, and provides suggestions for overcoming those difficulties. These include the parties' inability to reach agreement; the reluctance of each party to make the first offer; highly emotional parties; parties focused narrowly on who is right and who is wrong; and steps to take when the mediation appears to be at an impasse.

Because so much mediation occurs in relationship to a pending or potential lawsuit, Chapter 5 examines the relationship between mediation and the law. Among the topics treated in Chapter 5 are legal protections for the confidentiality of mediation; the disputants' obligations to attend and engage in mediation; the mediator's obligation to act impartially and with clarity and integrity; preservation of the disputants' free choice whether or not to settle in mediation; and the protection of the judicial system's role and reputation.

In Chapter 6, we provide frank advice for readers who think they would like to be mediators. We begin by quoting experienced mediators on the psychological rewards and social value of serving as a mediator. The chapter then focuses on the difficulty of making mediation a full-time career – primarily a greater supply of would-be mediators than demand for mediation services. Chapter 6 concludes with advice on overcoming that difficulty. Here we discuss the importance of taking one or more basic mediation training courses; the value of getting appropriate credentials (often, but not always, a law degree); developing a marketing plan; and keeping up with developments in mediation by joining mediator organizations and reading about mediation (with suggestions for both).

One final note to those readers who are primarily interested in the practice of mediation in countries outside the United States. Chapter 5 is admittedly limited to the relationship between mediation and the law in the United States, and Chapter 6 deals with becoming a mediator in the United States. On the other hand, we believe that Chapters 1–4, with their focus on interests, rights, and power as differing approaches to resolving disputes are equally valuable in other countries and cultures. So, too, we think that our analysis of the advantages of

interest-based mediation and the roles of the mediator and the parties in interest-based mediation will be as useful to mediation providers, users, and learners in other countries and cultures as in the United States.

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