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Book Review

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BOOK REVIEW

MEDIATION: LAW, POLICY AND PRACTICE

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The authors explain, in the Preface, their intent that MEDIATION: LAW, POLICY, AND PRACTICE serve as resource for practicing lawyers as well as for judges and legislators.[1] To a large extent,[2] this book serves that purpose admirably, not merely because it is the first real treatise on mediation directed toward lawyers, but also because it is well-researched, carefully, thoughtfully and precisely written, and because it identifies and articulates issues at the cutting edge of mediation as a field of law practice. And, in the process of providing guidance to practitioners, Rogers and McEwen have created a work which is an invaluable resource for students, teachers, and scholars as well. Some might wish the work gave more explicit attention to the influence on the genesis of legal mediation of the alternative dispute resolution movement.[3] Specifically, some proponents of mediation[4] might desire that the work focus more upon creating a less adversarial philosophy for a non-adjudication practice of law.[5] But such a focus is at best tangential to the scope of the book as defined by the authors,[6] although they do give substantial, albeit sometimes subtle, attention to this trend.

MEDIATION follows a traditional treatise format articulating and analyzing the current state of the law and citing the cases, statutes, and other authority underpinning it. In addition, in a manner somewhat unusual for a treatise, it advocates for the acceptance and legitimacy of mediation as a proper area of legal practice. This advocacy permeates the work, and several examples are highlighted below.[7]

MEDIATION is quite competent in its summarization of areas in which legal precedent and commentary are most prevalent. These areas include confidentiality in the mediation process[8] and ethical issues in connection with legal services provided by a mediator.[9] The authors identify the key legal issues, distill the wealth of available materials to derive, and support with extensive annotations the central established legal principles. They also pinpoint major issues which remain

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1. N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY, AND PRACTICE (1989) [hereinafter MEDIATION].

2. The book's few limitations, virtually all of which are related to format, are discussed *infra* notes 72-88 and accompanying text.

3. *See, e.g.*, Menkel-Meadow, *infra* note 60; Fisher & Ury, *infra* note 63.

4. *E.g.*, Harrington & Merry, *infra* note 32.

5. *See infra* notes 32-38 and accompanying text.

6. *See supra* note 1 and accompanying text.

7. *See infra* notes 24-31 and accompanying text.

8. MEDIATION, *supra* note 1, at 95-146 (Chapter 8, Confidentiality).

9. *Id.* at 147-77 (Chapter 9, Legal Services).

unresolved. Valuable as this extraction is, MEDIATION is even more valuable in its breaking of new ground through its discussion of mediation. The book serves previously unmet needs[10] of several audiences interested in alternative dispute resolution in general and in mediation in particular. The book consists of twelve chapters, covering the gamut of issues a law practitioner (either as an advocate or a mediator), judge, or legislator will face in connection with many aspects of mediation.[11] Chapters are divided into numbered subsections, and provide a thorough but concise discussion of each topic, supported by copious footnote citation to cases, statutes, and commentary. Merely collecting into one readable, reasonably-sized volume such diverse, thoughtfully researched and analyzed material makes an enormous contribution toward establishing mediation as a proper and accessible dispute resolution alternative for lawyers. Because there is only now developing any distinct body of law about mediation, access to material about mediation-related issues has often been difficult. It has been necessary for the researcher to first be aware of the various legal doctrines, such as contracts,[12] ethics,[13] constitutional law,[14] evidence, privilege, and procedure,[15] which could affect the mediation process and enforceability of any related agreements, and then investigate the law in those areas as it applies to mediation. In some cases the materials are located in other-than-legal sources,[16] or in various state statutes

10. The dearth of attention to such detail in the pre-existing literature is not surprising, since even the law school course books which have blossomed in the last 5 years have surveyed various dispute resolution mechanisms, rather than focusing exclusively on mediation. *See* J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION (1989); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS (1987); N. ROGERS & R. SALEM, A STUDENT'S GUIDE TO MEDIATION AND THE LAW (1987); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION (1986); S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION (1985). Hence they did not attempt to offer the comprehensive discussions about mediation which MEDIATION offers. Furthermore, of course, course books highlight only a few cases, statutes, or commentaries deemed particularly illustrative by the authors rather than attempting to collect all authoritative materials on any subject. By the same token, non-law books on mediation are intended to familiarize a wider audience, consisting of non-lawyers as well as lawyers, with the mediation process itself without necessarily focusing on the legal authority which provides support (or not) for the practice's continued vitality.

11. MEDIATION, *supra* note 1, at 7-13 (Chapter 2, Practices in Mediation), 15-30 (Chapter 3, Advising Clients about Mediation), 31-42 (Chapter 4, Mediation Policy Objectives Historically), 43-59 (Chapter 5, Mandates by Law to Use Mediation), 61-73 (Chapter 6, Mediation Clauses in Contracts), 75-93 (Pressures to Settle through Mediation), 95-146 (Chapter 8, Confidentiality), 147-77 (Chapter 9, Legal Services by the Mediator), 179-202 (Chapter 10, Mediation Standards), 203-24 (Chapter 11, Issues Related to Specific Types of Disputes), 225-42 (Chapter 12, Legal Policy Regarding Mediation).

12. *See, e.g., id.* at 61-73 (Chapter 6, Clauses in Contracts).

13. *See, e.g., id.* at 147-77 (Chapter 9, Legal Services).

14. *See, e.g., id.* at 83-88 (§ 7.3).

15. *See, e.g., id.* at 83-134 (§ 7.3-8.22).

16. A whole body of knowledge contributing to dispute resolution methodology exists in non-law disciplines like communications, *see, e.g.*, J. HOCKER & W. WILMOT, INTERPERSONAL CONFLICT (2d ed. 1985); social sciences, *see, e.g.*, C. MOORE, THE MEDIATION PROCESS (1986); M. DEUTSCH, THE RESOLUTION OF CONFLICT (1973); *The Mediation of Social Conflict*, subject of the entire summer issue of 41 J. SOCIAL ISSUES No. 2 (1985); labor relations, *see, e.g.*, W. MAGGIOLO, TECHNIQUES OF MEDIATION (1985), and management theory, *see, e.g.*, D. LAX & J. SIBENIUS, THE MANAGER AS

which, Westlaw and Lexis notwithstanding, are hard to research comparatively because of the necessity of familiarizing oneself with different state codification systems, indexing systems, and decisions about how to entitle legislation.[17] Sometimes, this is a fairly straightforward task. For instance, it is probably reasonable to expect any law school graduate, or at least one who has passed the Multistate Bar Examination, to recognize that Federal Rule of Evidence 408[18], Compromises and Offers to Compromise, may affect the admissibility in federal court of discussions which take place during mediation proceedings. However, in other circumstances it is not always so clear which legal doctrines will be relevant to mediation. This may be especially true when several legal principles converge to create a doctrine which may affect the viability or enforceability of mediation-related doctrine. In such a case, one without sufficient legal experience may be unable to anticipate the convergence and be caught unaware.

An interesting example of how MEDIATION provides assistance to the unwary or inexperienced occurs in the brief but enlightening discussion of "Partial Settlements in Multi-Party Litigation,"[19] or "Mary Carter" agreements.[20] Numerous legal issues arise when one of several defendants negotiates with a plaintiff a settlement agreement in which Defendant One guarantees Plaintiff a certain maximum sum. However, the amount which Defendant One must actually pay Plaintiff will be reduced by any payments made by other defendants who are found liable to Plaintiff and satisfy that judgment. By this agreement, Defendant One has agreed both to act as surety for the agreed-to amount and has limited its maximum liability to that amount. Since Defendant One often remains in the lawsuit as a defendant, the agreement raises concerns about the extent to which the agreement should be kept confidential or should be enforced at all. Procedural, constitutional, evidentiary, and contract law concerns are implicated. Rogers

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NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN (1986). *See also* authorities cited in MEDIATION, *supra* note 1, at 15 n.2.

MEDIATION highlights many of these non-legal influences in Chapter 3, at 15-30 and in Section 4.2 at 33-39. In addition, at least two major journals which have come into existence in the last ten years established interdisciplinary editorial committees and provide for a scholarly communication among lawyers and non-lawyers concerned with dispute resolution. MEDIATION QUARTERLY, sponsored by the Academy of Family Mediators (now in its seventh volume); NEGOTIATION JOURNAL, published in cooperation with the Program on Negotiation (now in its sixth volume).

17. Pietrzak, *Some Reflections on Mackay's Application to Legal Economic Strikes in the Public Sector: An Analysis of State Collective Bargaining Statutes*, 68 OR. L. REV. 87, 120 n.184 (1989); Gagliardo, *Is Looking Up Case Precedent in Other Jurisdictions Worthwhile in Public Sector Labor Relations? A Union Perspective*, 6 J. L. & EDUC. 205 (1977). Rogers and McEwen include an impressive and comprehensive compilation of state and federal legislation addressing mediation, either authorizing its use to resolve specific types of disputes (e.g., those involving labor or family relations, automobile warranties, agricultural debts, or civil rights) or mandating how to resolve various issues of mediation procedure (e.g., confidentiality of the mediation process, mediator liability, and enforceability of the mediated agreement.) *See* Appendices B and C. For further discussion of these appendices, *see* notes 68-70 and accompanying text.

18. FED. R. EVID. 408.

19. MEDIATION, *supra* note 1, at 133-34 (§ 8.22).

20. *Id.* at 133 n.17 and accompanying text.

and McEwen succinctly describe the problem, explain the way courts have dealt with this issue in the context of multi-party *litigation*, and point out the extent to which the issue is still unresolved in the context of *mediated* agreements.[21]

MEDIATION is the rare treatise studying alternative dispute resolution which covers this question in the context of mediation. In fact, Mary Carter agreements are rarely considered at all in ADR texts, and when they are discussed, the discussion arises in the context of unfacilitated negotiation rather than mediation.[22] MEDIATION's attention to this matter exemplifies its comprehensive and thoughtful consideration of mediation-related matters. The book assists practitioners—many of whom are neophytes in this new-in-itself area of law—by making explicit the heretofore often unarticulated link between negotiation and mediation as well as by drawing attention to issues which might otherwise take substantial expertise and/or research to elucidate.

MEDIATION especially assists the practitioner who is less experienced in mediation. By collecting materials about laws relating to mediation, it provides the practitioner with a solid base from which to begin legal analysis. Perhaps most importantly, it identifies the relevant cases and statutes in each state. The practitioner is thereby equipped not only with knowledge of the prevailing legal doctrine, if any, in the forum state, but also with awareness of the variations found in other states. These comparisons enable one to argue, when appropriate, for use in the mediation context of approaches which have proven effective to facilitate dispute resolution on other contexts.[23]

Equally important is the forthright identification of the many areas where the various relevant legal doctrines have not yet been applied to mediation. The authors thoughtfully analyze those doctrines and make recommendations as to what legal response would be optimal. These provide practitioners a helpful starting point for their own evaluation and analysis. Because the authors assume the legitimacy of mediation as a dispute resolution mechanism, they are persuasive in supporting its effectiveness to practitioners. For similar reasons, the work is an invaluable resource for judges confronting, often for the first time, legal issues surrounding the use of mediation.

In addition to those sections in which the authors focus directly on a lawyer's role in mediation, they also make another significant contribution toward establishing mediation's legitimacy as a field of law practice. They facilitate worthwhile research in their treatment of the many assumptions which have been raised as objections to or problems with mediation as an alternative to litigation. To a large extent, the application of law to mediation has not been considered by the courts or regulated by legislatures; it has been necessary for lawyers interested in or recommending mediation to predict the court's likely decision about the

21. *Id.* at 133-34.

22. *See* J. MURRAY, A. RAU & E. SHERMAN, *supra* note 10; WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 102, 103-04 (1983).

23. Unfortunately, MEDIATION'S chosen citation system is less than ideal in providing access to various jurisdictions' law. *See infra* text accompanying notes 72-81.

applicability of those laws in connection with enforcing or refusing to enforce a mediated agreement. In addition, all this prediction must be done in a context of some lawyers' ambivalence about mediation[24] and in the context of ably articulated criticisms about its ability to safeguard rights which an adversarial litigation model allegedly protects.[25]

The authors articulate many of the assumptions on which these criticisms are based, describing the great extent to which they are unsupported by either empirical evidence or thoughtful reflective analysis, and then lay out their own careful and probing argument responding to the criticism. For example, they point out a position that is perhaps a matter of conventional wisdom among those critical of mediation: in some cases, concerns about parties who are unrepresented at mediation proceedings become "translated . . . into specific warnings to lawyers not to refer to mediation those clients who are thought to be at a bargaining disadvantage because they are women or members of minority groups."[26] The authors then conduct an analysis of the scholarly support, or, more properly, the lack of scholarly support for this proposition, and conclude that "[t]he research provides no clear indication whether or not such warnings are justified."[27] Furthermore, as the authors explain, asserted disadvantages such as settlements that potentially provide a divorcing wife with less than she might attain through litigation, as well as women's articulated lack of confidence may be balanced by "savings in attorneys fees, more certainty of result, less trauma for the children, and other factors which may be of equal or greater importance to the litigants than monetary award."[28]

In other cases, the authors point out the extent to which the existing law governing mediation has not yet resolved important issues. For instance, it is not clear the extent to which courts would apply to mediation principles governing the enforceability of arbitration agreements in light of waiver agreements, underlying public policy issues, or agreements biased in favor of one party.[29] They also identify the important unresolved issue of how statutory provisions requiring the reporting of, e.g., child abuse, apply when privilege attaches to mediation.[30]

One of the most remarkable, and exciting, aspects of MEDIATION is its success in interweaving legal and extra-legal issues and materials. MEDIATION accomplishes this perhaps even more than other non-judicial ADR processes.[31] Much of the philosophy underlying the use of mediation springs from therapeutic

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24. *See infra* notes 52-56 and accompanying text.

25. *See, e.g.*, Fiss, *infra* note 54; Auerbach, *infra* note 55.

26. MEDIATION, *supra* note 1, at 25 (Chapter 3, Advising Clients about Mediation).

27. *Id.*

28. *Id.* at 25-26.

29. *Id.* at 69-70 (Chapter 6, Mediation Clauses In Contracts). *See also id.* at 133-34 (Chapter 8, Confidentiality) and discussion about "Mary Carter" agreements, *supra* text accompanying note 22.

30. *Id.* at 143 n.69 (Chapter 8, Confidentiality).

31. *See infra* text accompanying notes 32-35.

and social transformation values[32] as well as out of jurisprudentially-based concerns about judicial economy[33] and the proper "fit" between legal complaints and the appropriate mechanism for resolving them.[34] In part because of these multi-disciplinary bases, and in part because mediation, as a form of facilitated negotiation, is intended to resolve disputes in a manner more fluid than the use of "legal proofs and reasoned arguments",[35] the process of mediation includes both legal and extra-legal aspects. To the extent that mediation takes place within the larger established social and legal system, instead of setting up a community-based dispute resolution mechanism parallel to and apart from established legal institutions,[36] mediation as a process relies on legal principles to govern enforcing those agreements,[37] as well as agreements to mediate in the first place.[38] In addition, existing legal rules not specifically developed with mediation in mind—e.g., evidentiary exclusions for compromise discussions and agreements (in the areas of both civil and criminal law)[39] and common law and statutory rules about privilege[40] impact directly on the extent to which a mediation proceeding is likely to be spontaneous, candid, and effective in resolving disputes. Furthermore, the legal system, both through the increasing numbers of statutes enacted to mandate or support mediation[41] and through judicially-established programs,[42]

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32. Harrington & Merry, *Ideological Production: The Making of Community Mediation*, 22 LAW AND SOC. REV. 709, 715-17 (1988).

33. *Id.* at 714.

34. *See, e.g.*, Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363 (1978) ("It is characteristic of these three ways of ordering [people's] relations that though they are subject to variation—they present themselves in different "forms"—each contains certain intrinsic demands that must be met if it is to function properly."); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 130-31 (1976) (["W]hat I am thus advocating is a flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes.").

35. Fuller, *supra* note 34, at 366; *see also* GOLDBERG, GREEN & SANDER, *supra* note 10, at 8 (charting features of adjudication).

36. *See* Harrington & Merry, *supra* note 32, at 715-17, and authorities cited therein.

37. MEDIATION, *supra* note 1, at 199-200 (§ 10.4).

38. *Id.* at 65-71 (§ 6.3).

39. *Id.* at 100-14 (§§ 8.3-8.9).

40. *Id.* at 139-46 (§§ 8.28-8.33).

41. MEDIATION does a masterful job of summarizing much of this legislation. *See* MEDIATION, *supra* note 1, at 273-91 (Appendix B).

42. The American Bar Association's Standing Committee on Dispute Resolution has compiled a summary of dispute resolution programs and lists, *inter alia*, their funding sources as well as sources of referrals for mediation. *See* 1990 Dispute Resolution Program Directory. A few of the mediation programs listed therein which received significant funding from local judicial systems and receive referrals from the courts include: Citizen Dispute Settlement Program (Toledo, Ohio), funded by the Toledo Municipal Court and receiving referrals from the municipal court prosecutor's office, and from judges, Directory at 284; Tri-County Mediation Center (Amsterdam, New York), funded by the New York State Unified Court System and receiving referrals from city courts, family courts, and town justices, *id.* at 218; Citizen's Dispute Settlement Program (Mt. Clemens, Michigan), funded by the district court and receiving referrals from the small claims court clerk, *id.* at 169; Piedmont Mediation Center, Inc. (Statesville, North Carolina), funded by grants, and receiving referrals from the criminal courts, magistrates, and juvenile officers, *id.* at 272; Dispute Resolution Centers (Houston, Texas),

lends legal legitimacy to mediation. Yet, the mediation system implicates values beyond merely legal or procedural concerns.[43] Although one of MEDIATION'S most significant purposes[44] and its clear focus[45] are to explicate the law regarding mediation, whether it derives from adjudication or legislation, the book acknowledges the interdisciplinary underpinnings of mediation as well.[46]

Some subsections directly address the relationship of lawyers to mediation.[47] The work includes some material, similar to that found in other materials on mediation,[48] simply explaining the process of mediation to the unfamiliar[49] and raising tactical issues such as whether mediation is the appropriate mechanism for resolving any particular dispute.[50] In addition, however, Rogers and McEwen innovatively raise previously little considered issues regarding the role of the lawyer whose client participates in a mediation session without a lawyer's being present.[51]

The American legal system has been struggling with how to cope with mediation as a dispute resolution alternative. Despite high level institutional support for a less litigious, more collaborative approach to resolving disputes,[52] there has been vocal and firm concern about extra-judicial dispute resolution.[53] Some of this reluctance is based in concerns about due process,[54] some in concerns about protecting those perceived to be disadvantaged due to power imbalances.[55] Much of the response to these criticisms has focused on the fact

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funded by local filing fees for civil litigation, receiving referrals from municipal courts, justices of the peace, county and district civil courts, *id.* at 319.

43. *See* Riskin, *infra* note 60; *cf.* Menkel-Meadow, *infra* note 60, at 801-04.

44. MEDIATION *supra* note 1, at v (Preface).

45. *Id. See also id.* at 43-59 (Chapter 5, Mandates by Law to Use Mediation); *id.* at 61-73 (Chapter 6, Mediation Clauses in Contracts); *id.* at 95-146 (Chapter 8, Confidentiality); *id.* at 243-810 (Appendices A, B, and C).

46. *See especially id.* at 20-26 and accompanying footnotes (§ 3.3), 31-42 and accompanying footnotes (Chapter 4). *See also supra* notes 33-36 and accompanying text.

47. *See especially* MEDIATION, *supra* note 1, at 3-4 (§ 1.2, Implications for Lawyering), 29-30 (§ 3.7, Lawyering During Mediation), 147-77 (Chapter 9, Legal Services by the Mediator: Conflict of Interest, Advertising, Joint Practice, and Unauthorized Practice).

48. *See, e.g.,* C. MOORE, *supra* note 16, at 13-43; J. FOLBERG & A. TAYLOR, MEDIATION 38-72 (1984).

49. *See, e.g.,* MEDIATION, *supra* note 1, at 7-13 (Chapter 2, Practices in Mediation).

50. *See id.* at 17-29 (§ 3.2-3.6, Advising Clients about Mediation).

51. *See id.* at 3-4 (§ 1.2, Implications for Lawyering), 29-30 (§ 3.7, Lawyering During Mediation). *See also* J. LANDERS, J. MARTIN & S. YEAZELL, CIVIL PROCEDURE 346 (2d ed. 1988); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 205 (1987).

52. *E.g.,* W. Burger, *Isn't There a Better Way?* Annual Report on the State of the Judiciary (January 24, 1982); Sander, *Varieties of Dispute Resolution*, 70 F.R.D. 79 (1976). Also, the American Bar Association's ongoing support for ADR is evidenced by the continued vitality of its Standing Committee on Dispute Resolution.

53. *See infra* notes 54-55 and accompanying text.

54. *E.g.,* Fiss, *Against Settlement*, 90 YALE L.J. 1073 (1984).

55. AUERBACH, JUSTICE WITHOUT LAW? 145 (1983); Delgado, *Fairness and Formality: Minimizing the Risk of Prejudice in ADR*, 1985 WISC. L. REV. 1351, 1391 (1985).

that mediation is often used to resolve disputes, such as small claims, neighborhood, or landlord-tenant disputes,[56] in which the amounts in controversy are often low while the underlying hostilities are often so high that resolution will be a time-consuming process. By pointing out that such cases are not cost-effective either for the lawyers or the courts involved, an attempt is made to assuage both the due-process/"second-class" justice concerns and lawyers' economic concern simultaneously.

MEDIATION responds to these concerns more directly by pointing out that lawyers may retain an important role in managing a dispute, even if mediation is the most appropriate dispute resolution mechanism:

> The mediation process presents lawyers with two unusual representational activities. If the client will participate without the presence of counsel, the lawyer essentially prepares the client to negotiate alone. If the lawyers will be present, mediation calls for adaptation of traditional advocacy strategies.[57]

In so doing, MEDIATION has contributed significantly toward establishing mediation's acceptability/propriety as an appropriate area of practice for lawyers. The authors assume that rather than being eliminated from the case once mediation is chosen, a lawyer instead retains an important advisory and strategic role. The authors indicate, for instance, that it is legitimate for the lawyer to decide to participate in a mediation session if a client is too weak or unskilled to participate effectively alone.[58] And lawyers who participate in these sessions retain their authority to decide what stance is appropriate and to choose, where appropriate, a "less argumentative role than is customary in other dispute resolution settings."[59]

Many significant works have attempted to persuade the lawyer, or the law student, of the value of adopting, at least sometimes, a collaborative, humanistic,

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56. The American Bar Association's most recent Dispute Resolution Program Directory, compiled by The Standing Committee on Dispute Resolution (1990) included listings for over 150 programs in the United States for which these disputes formed a substantial part of their caseloads. For a random sample of some of these programs, *see, e.g.*, Community Dispute Resolution Program of Delaware County, Pennsylvania, *id.* at 298; Philadelphia, Pennsylvania. Municipal Court's Dispute Resolution Program, *id.* at 299; DC Citizen's Complaint Center and Mediation Service, *id.* at 63; Kauai, Hawaii Economic Opportunity Mediation Board, *id.* at 93; Citizen Dispute Settlement Program, Orlando Florida, *id.* at 77; Community Mediation Services of Central Ohio, *id.* at 278; Small Claims Division, Franklin County, Ohio, Municipal Court, *id.* at 280. It is puzzling that MEDIATION barely mentions directly this widespread employment of mediation to resolve these often community-based disputes, although the book does explain the use of mediation to resolve community-based civil rights disputes. MEDIATION *supra* note 1, at 212-13 (§ 11.6).

57. MEDIATION, *supra* note 1, at 29 (§ 3.7).

58. *Id.* at 30.

59. *Id.*

mediative view of a dispute.[60] MEDIATION attempts a more strictly pragmatic approach, and identifies how a lawyer may and ought to retain a role of service to their client once mediation is chosen as the appropriate dispute resolution mechanism.[61] Those who view mediation as a vehicle for decreasing reliance on the professional advocate[62] may be discouraged by Rogers and McEwen's acceptance of and implicit support for the lawyer's continuing, albeit altered, role when mediation is chosen. On the other hand, their view on this issue will alleviate many lawyers' concerns that the growth of mediation will inevitably result in the legal profession's loss of a meaningful role in dispute resolution. The authors' recognition of the law profession's continuing meaningful and responsible role not only models a technique of collaborative negotiation which acknowledges and respects a participant's basic needs[63] but also sets the stage for lawyers' increased acceptance of mediation. By articulating the legitimate need for a lawyer to retain some responsible role in a case, even when mediation is the most appropriate dispute resolution mechanism, the authors impliedly acknowledge the lawyer's very real need for (1) income (a basic security need),[64] (2) validating their status as a professional (a need for esteem)[65], and (3) satisfying the need for self-actualization by using one's talents and skills to assist others.[66] At the same time, the authors recognize the apparent need of at least some disputants to retain more autonomy in settling their dispute than the litigation alternative can provide or to resolve the disagreement in a more healing way.[67]

Perhaps it would have been helpful for the authors to articulate this process as well as modeling it. Nevertheless, their approach will probably "ease" many lawyers into a less instinctively hostile reaction to the use of mediation as a dispute resolution alternative.

Legislators and others drafting legislation governing mediation will also benefit from this work. First, the appendices include an invaluable collection of

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60. *E.g.,* Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 MO. J. DISP. RESOL. 31; Riskin, *Mediation and Lawyers*, 43 OHIO ST.L.J. 29 (1982).

61. MEDIATION, *supra* note 1, at 29-30 (§ 3.7).

62. *See supra* authorities cited in note 32.

63. *See, e.g.,* R. FISHER & W. URY, GETTING TO YES (1981); G. NIERENBERG, THE ART OF NEGOTIATING (1968); C. Menkel-Meadows, *Towards Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

64. G. NIERENBERG, *supra* note 63.

65. *Id.*

66. *Id.*

67. Rifkin & Sawyer, *Alternative Dispute Resolution—From a Legal Services Perspective*, NLADA BRIEFCASE 20, 22 (Fall, 1982); HALT, Inc., *Citizens Legal Manual: Divorce* 6-10 (1984); Kogan, *Hawks, & Doves*, 7 AMERICANS FOR LEGAL REFORM, Jan. - Mar. 1987, at 12; Ruehl & Cook, *Issues in Mediation: Rhetoric and Reality Revisited*, 41 J. SOC. ISSUES, No. 2, at 168-71 (1985); Harrington & Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y R. 709, 715-17 (1988).

information about state and federal statutes regulating mediation.[68] The authors have accumulated, organized, charted, and reproduced the actual statutory texts of many mediation provisions. While some of the statutes presented in the appendices actually establish mediation programs,[69] many of the provisions cited and reproduced do not stand alone in a jurisdiction's statutory scheme but are part of broader statutes which provide comprehensive regulation of some specific area of substantive concern, such as regulation of automobile warranties.[70]

Most of the significant criticisms of this work relate to format. Unfortunately, several editorial decisions make the book less than optimally user-friendly. Since MEDIATION is intended to "provide lawyers with a resource on tactical, legal and ethical issues related to using mediation,"[71] it would be beneficial if the useful materials within the book were easy to access. Admittedly, the book is arranged helpfully in chapters which are subdivided into clear and numerically delineated sections. The sections and their titles are listed in the table of contents, each chapter's section headings are listed again at the beginning of that chapter, and the chapter introductory sections generally make footnoted intra-chapter reference directing the reader to a more detailed discussion of the highlighted topics. So far so good. But section references throughout the book do not include page references. Perhaps only a minor irritant when one is trying to locate a pertinent section of *text*, the omission of page references is particularly inconvenient with regard to cases and other citations of authority. The table of cases refers one only to the section(s) in which case names appear. Because case names rarely appear in the text itself, a reader wanting to locate a particular case (or a textual discussion about it) must browse through the entire section's footnotes, many of which contain long string citations, in manner appropriate to a treatise attempting to report comprehensively about treatments of mediation issuers in all United States jurisdictions. This seems an undue and inappropriate burden to place on the busy practicing lawyers, judges, and legislators who comprise the

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68. *See* MEDIATION, *supra* note 1, at 243-72 (Appendix A, Selected Confidentiality Legislation, by Scope and Jurisdiction), 273-91 (Appendix B, Significant Mediation Legislation, by Topic and Jurisdiction), 293-810 (Appendix C, Text of Selected Mediation Legislation by Jurisdiction). Appendix D, *id.* at 811-27, reproduces several Codes of Ethics for Mediators. These appendices actually make up over two-thirds of the volume, comprising 585 of the 827 pages of textual material.

69. *See, e.g.*, California's community dispute resolution program, CAL. BUS. & PROF'L CODE, §§ 465-471.5, *cited in* MEDIATION, *supra* note 1, at 307-16 (Appendix C); *see also* MEDIATION, *supra* note 1, at 274, 276 (Appendix A); Minnesota's Civil Mediation Act, MINN. STAT. §§ 572.33-572.41, *cited in* MEDIATION, *supra* note 1, at 536-39 (Appendix C); Washington's provision establishing dispute resolution centers, WASH. REV. CODE §§ 7.75.010-.100 (1987), *cited in* MEDIATION, *supra* note 1, at 773-82 (Appendix C).

70. *See, e.g.*, Virginia's provision on mediation *cited in* MEDIATION, *supra* note 1, at 772-73 (Appendix C). *See also* Wisconsin's child abuse notification requirement, WIS. STAT. § 43.981, *cited in* MEDIATION, *supra* note 1, at 786-87 (Appendix C); Nevada's Medical Malpractice Mediation, NEV. REV. STAT, § 630.364, *cited in* MEDIATION, *supra* note 1, at 620 (Appendix C); Colorado's mobile home mediation provision, COLO. REV. STAT. § 38-12-216, *cited in* MEDIATION, *supra* note 1, at 344 (Appendix C).

71. MEDIATION, *supra* note 1, at v (Preface).

work's intended audience. It would be much more useful to this audience if references were to the page number on which the citation is found,[72] or, perhaps even better, to the relevant section *and footnote number*.[73] Additionally, it is frustrating that the book lacks a table of citations to non-case authority referred to, especially when many of the references are to statutes, rules of procedure and evidence, and various ethical codes.[74] Making case law the only resource easily accessible by means of a Table of Authorities seems incongruent with the nature and intent of mediation. This is especially true, considering MEDIATION'S interdisciplinary philosophical underpinnings,[75] the relative paucity of case law governing this subject[76] coupled with the abundance of legislation regulating the field,[77] and the fact that mediation, generally a voluntary[78] *alternative* to litigation, reconceives the role of law[79] in dispute resolution.

I could not discern any rationale for the book's inconsistency in referring to rules of evidence and procedure: sometimes they are quoted in full[80] and sometimes they are not.[81] Since these materials, particularly at the federal level, probably are easily accessible to most who will use this book, the inconsistency is primarily inconvenient. Nevertheless, it makes less useful a work which promises to be very useful indeed. And the problem seems so unnecessary, since it could easily have been resolved by an editorial decision to quote the cited rule always or never.

Similarly, there was no discernible system for the order of cases in the numerous string cites. Blue Book form was not used and cases did not seem to be ranked in any other discernible pattern, whether alphabetically (by case name or jurisdiction), chronologically, or hierarchically (by level of court). This is a particularly glaring problem given the intended audience. One imagines a reader would be particularly interested in decisions made in his or her jurisdiction, yet the citation ordering system evidences no easy way to access them. Hopefully,

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72. For an example of a treatise employing this cross-referencing method, *see* J. FRIEDENTHAL, M. KANE AND A. MILLER, CIVIL PROCEDURE (1985).

73. For examples of treatises employing this cross-referencing method, *see* M. ROSE & J. CHOMMIE, FEDERAL INCOME TAXATION (3d ed. 1988); D. MANDELKER, LAND USE LAW (2d ed. 1988).

74. *See especially* MEDIATION, *supra* note 1, at 148-62 (§ 9.2, which references ethical rules and federal, state, and local bar association ethics opinions from at least twenty jurisdictions, at 1483); *id.* at 179-202 (Chapter 10, Mediation Standards: Liability, Enforceability, Public Funding Criteria, and Other Quality Control Measures). Chapter 8, *id.* at 95-146, on "Confidentially," the longest chapter in the book, also includes many statutory references.

75. *See supra* text at notes 32-35.

76. *See supra* text accompanying notes 12-15.

77. *See, e.g.,* statutes *cited in* MEDIATION, *supra* note 1, at 273-91 (Appendix B).

78. MEDIATION, *supra* note 1, at 46 (§ 5.1).

79. *See, e.g.,* Mnookin & Kornhauser, *Bargaining in the Shadow of Law*, 88 YALE L.J. 950 (1979); Menkel-Meadow, *supra* note 60, at 789-92.

80. *See, e.g.,* MEDIATION, *supra* note 1, at 112-13 n.94 (Chapter 8, quoting in full FED. R. EVID. 410).

81. *See, e.g.,* MEDIATION, *supra* note 1, at 144 n.76 (Chapter 8, citing to FED. R. CIV. P. 26(b)(1), without quoting).

the publishers will give serious thought to remedying this particular problem in forthcoming pocket parts as well as in any future editions of the hardback text.

Finally, placement of the materials on fairness in MEDIATION seems most unfortunate. Challenges to the use of mediation often raise concerns about whether mediation allows a "fair" result, whether this means (1) that due process is given,[82] (2) that power between the parties is evenly balanced,[83] or (3) that the result comports with some other expectation of the broader society. [The authors discuss fairness in a substantial subsection[84] of the book, albeit in the chapter about legal policy,[85] which, with the chapter sketching mediation's historical development,[86] are likely to be perceived as the most "academic" and least "practical" chapter in the treatise.] Locating that discussion in the final chapter of the book may give the reader the unfortunate impression that the topic is relatively unimportant. There is no express articulation of the fairness concern anywhere outside this subsection, even in materials which could logically be understood to implicate the issue.[87] It would have been helpful and somewhat more comprehensive to cross-reference the fairness and quality[88] discussions, both in the text itself and in the index, in order to alert and direct the reader to the thorough and comprehensive discussion of "fairness" which actually takes place by means of both those discussions, but which the reader may not recognize without such editorial assistance. Neither the "quality" nor the "fairness" discussion alone covers the entire field; not acknowledging their interlinkage misleads the intended reader—who in all likelihood, will dip into the book periodically for insight into a particular presenting question rather than reading it cover-to-cover to elicit the appropriate interrelationships. Furthermore, the most likely reader is one without the substantial prior knowledge about mediation necessary to expect him or her to perceive the inherent connection between "quality" and "fairness" and be independently aware of the need to read both sections.

CONCLUSION

In their comprehensive and thoughtful collection and analysis of case law, legislation, and in much of the significant commentary about mediation, authors Rogers and McEwen have contributed substantially toward making mediation less foreign and more accessible to lawyers generally. Much as the publication five

82. MEDIATION, *supra* note 1, at 233-39 (§ 12.4).

83. *Id.* at 239; *see also id.* at 182-83.

84. *Id.* at 233-39 (§ 12.4).

85. *Id.* at 7-13 (Chapter 2).

86. *Id.*

87. *Id., e.g.,* at 181-86 (§ 10.2 extensively discussing mediation "quality," which also raises questions about power or "bargaining" imbalances, and the public interest).

88. *See id.*

years ago of DISPUTE RESOLUTION,[89] the first law school course book providing comprehensive coverage of alternative dispute resolution mechanisms, was a significant step toward establishing ADR as a proper field of law school study, MEDIATION's publication is a benchmark, indicating, as much as do the statutes authorizing and regulating mediation,[90] that mediation has become a legitimate dispute resolution alternative, and one with which even lawyers ambivalent about its use[91] need to become familiar.[92] In addition, MEDIATION goes a long way toward lessening that ambivalence and increasing endorsement of the mediation process by articulating an appropriate and useful role for lawyers in that process.[93] MEDIATION signals the longterm viability of mediation as a rightful and widely appropriate alternative to litigation. The alternative dispute resolution movement has clearly come of age.

89. S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION, *supra* note 10.

90. Charted and reproduced in MEDIATION, *supra* note 1, at 243-810 (Appendices A, B, and C).

91. *See supra* notes 24-25 and accompanying text; notes 32-36 and accompanying text.

92. MEDIATION, *supra* note 1, at 243-810 (Appendices A, B, and C).

93. *See supra* text at notes 57-67; MEDIATION, *supra*, note 1 at 29-30 (§3.7).