

Chapter One - Overview of the ADR Universe

- A. Introduction

- Most professionals not educated in skills required for constructive resolution of conflict
- Alternative Dispute Resolution (ADR) resulted from frustrations of trying to use the justice system for dispute resolution
- ADR does not ignore fact that disputes exist-it focuses on new and creative methods to resolve disputes-involves examining the underlying conflicts (identifying and resolving)

- B. What Are Disputes?

- Conflict - Latin (*con*-together and *fligere*-to strike)
- Conflict - encounter with arms, a fight, a battle, a prolonged struggle
 - Mental or spiritual struggle within a person
 - Clashing or variance of opposed principles, statements or arguments
- Variables:
 - Many forms - looks to pistol shot
 - Intensity varies
 - What conflict affects
- Communication process is integral-verbal and nonverbal
- Conflict not always negative-can be positive
 - Closer examination of issue
 - Assessment of situations
 - New and creative resolutions
 - Establish and strengthen relationships
 - Root of personal and social change

- C. Traditional Means of Resolving Disputes

- Fight, force, coercion
 - If ignore the conflict-it doesn't get resolved
- Accommodation-but leads to ceding to other's demands and not meeting your needs-leads to later frustration
- Voluntarily relinquish responsibility for the conflict-leave to chance (third party with no interest)
- Determining rights and making power plays-collaboration
- Look at parties interests:
 - Reconcile underlying interests
 - Determine who is right
 - Conclude who is more powerful

- D. The Variety of ADR Devices

- ADR - identifies group of processes through which disputes, conflicts, and cases are resolved outside of formal litigation procedures
 - Adjunct to legal system
- Basis of ADR-negotiation process
- ADR - involves third party neutral who assists parties in reaching a resolution to a dispute
- 1. **Adjudicative** - neutral adjudicates or makes a decision (most similar to formal court proceedings)
 - a. **Arbitration**

negotiations

- **b. Lay Evaluation - The Summary Jury Trial**
 - Trial in summary fashion-gives litigants their day in court
 - Attorneys present abbreviated version of evidence to advisory jury selected from regular jury pool
 - Testimony is usually one witness per side
 - May be binding-depends on parties' agreement
- **c. Judicial Evaluation**
 - Knowledge, experience and temperament brought to case by retired judge-helpful in assisting the parties reach a settlement
 - Judge merely points out to lawyers and litigants the strengths and weaknesses of the case
- **d. Specialist or Expert Evaluation**
 - If case turns on technical issue beyond understanding of court, lawyers and jury
 - Provide independent expert evaluation
 - Areas such as construction, computer design, securities, biomedical technology
 - If all parties agree to neutral expert-generally accepted as definitive
 - Can also be included as part of mediation
- **3. Facilitative** - neutral does not render a decision or evaluation; natural provides assistance to parties so that they may reach an acceptable agreement
 - **Mediation** - third party neutral acts as facilitator to assist in resolving a dispute between one or more parties
 - Least adversarial and encourages parties to communicate directly
 - Mediator - helps identify real issues of dispute and interests of the parties and generating options for settlement
 - Goal: parties themselves arrive at a mutually acceptable resolution of the dispute
 - Flexible
 - Valuable when parties want to maintain the relationship
 - **Conciliation** - over the telephone
 - Disputing parties have been reconciled and the relationship has been mended
 - **Consensus building** - extended mediation involving large groups and a number of conflicts
 - Make take place over a period of time
- **4. Combined Processes and Hybrids**
 - Use ADR process in conjunction
 - Most common - Med-Arb (arbitration and mediation processes)
 - Mini-Trial - negotiation, mediation and case evaluation
 - Parties want continued business dealings
 - Jury determined settlement - jury summary trial and arbitration
 - Proceeds similar to summary jury trial, but jury provides a binding settlement
- **E. Use of ADR**
 - No bad choices - but need to decide which process, or combination, to use
 - To choose:

- Conducted by sole arbitrator or panel of three
- Arbitrators listen to adversarial presentation of all sides and render decision (award) - by attorneys or parties
- Some rules may govern process
 - Can submit evidence and use witnesses and experts
- Arbitrators take no more than 30 days to deliberate and render decision
 - Decisions are generally binding where parties have previously contracted for arbitration
- Very limited statutorily defined rights of appeal
- Mandatory court arbitration - advisory nature
- Other variables:
 - Determination of rules of procedure to follow
 - When in dispute arbitration appropriate
 - Amount of discovery
 - Arbitrator explain award or naked award
 - Arbitrator make findings of fact and conclusions of law
 - Contract to expand appealability
 - Background of arbitrators
- **b. Private Judging**
 - Parties have retired or former judge hear the case and render a decision
 - Court order or parties agree to do
 - Can decide all issues or just a portion of the case
 - Resembles traditional litigation-different in terms of expertise of judge, speed of decision and flexibility in procedure rules
 - Use witnesses and documents
 - Record of trial is made
 - Decision entered referring court as judgment of the court-same rights as if judgment rendering by referring court
- **c. Fact-Finding**
 - Neutral third party, after gathering information from all parties, makes a determination of the facts
 - May be finding or advisory
 - Portion of matter or final resolution
- **2. Evaluative** - providing lawyers and litigants with feedback as to merits of the case; process whereby advocates present their version of the case to one or more third party neutrals, who evaluate the strengths and weaknesses of the cases
 - **a. Peer Evaluation**
 - Texas-Moderated Settlement Conference
 - Panel of three neutral, experienced attorneys who listen to factual and legal presentations by parties' counsel
 - Panel then questions attorneys and their clients
 - Renders advisory, confidential evaluation of strengths and weaknesses of the case and provides a range for settlement
 - Not binding-but should assist in further settlement

- Look at from perspective of parties
 - Then look at from public-interest perspective
- Evaluate client's goals and which process likely to achieve those goals
 - Then look at what are the impediments to settlement and what process is most likely to overcome those impediment
- Tables suggest the values of each procedure in meeting clients objectives (page 18 and 19)
- Lawyers must consider not only what the client wants but also why the parties have been unable to settle their dispute and then must find a dispute resolution procedure
- Rule of Presumptive Mediation:
 - Mediation has greatest likelihood of overcoming all impediments except different views of facts and the law
 - First attempt customary mediation techniques-if not successful, mediation can make an informed recommendation for a different procedure
 - Presumption overcome if either party has strong interest in receiving a neutral opinion, obtaining precedent or being vindicated, and is unwilling to consider any procedure that forecloses the possibility of accomplishing that objective
- ADR - permanent part of justice system
 - More lawyers are using these processes to their benefit (not looking at them as a threat)

Chapter Two - The Mediation Process

- **A. Overview**
 - Purpose: assist people in reaching a voluntary resolution of a dispute or conflict
 - Not rigid, but fluid in nature
 - Deals with human behavior and motivation-must also be adaptable to individual differences
- **B. Historical Perspective**
 - **1. International Sphere**
 - China and Japan-first choice (not alternative) for dispute resolution
 - Focused on conciliatory approach to conflict (morals rather than coercion)
 - **2. United States**
 - Distinct roots:
 - Community justice
 - Solve disputes in labor arena
 - Native Americans-continue to use peace making (dealing with underlying causes of conflict and mend relationships)
 - **3. Current "Movement"**
 - AAA - American Arbitration Association
 - Set up pilot mediation projects-attempt to ease social tensions
 - Law Enforcement Assistance Administration - set up mediation program for citizen's disputes

- Pound Conference-movement was actually born
 - Attendees (judges, court administrators, legal scholars) wanted to look at exactly why people were so dissatisfied with the way justice was administered in the United States
 - Follow up task force established
 - Pilot project at Neighborhood Justice Centers (NJC) resulted in high satisfaction by parties of use of mediation to resolve minor disputes
 - Today, there are over 400 centers
 - Lead to ADR use in justice system
 - Judges realized that by referring a matter to dispute resolution process early, a settlement could occur more expeditiously-with generally more satisfied participants
 - Today, ADR is integral part of pre-trial procedure in many state and federal courts
- C. Dissection of the Mediation Process
- *Mediation is an art, not a science*
 - 1. Generally: Traditional Models
 - Preliminary Arrangements-DON'T OVERLOOK THIS STEP
 - Prior to beginning actual mediation session
 - Referral
 - Select mediator
 - Determine who should attend
 - Issues of fees
 - Settlement authority
 - Timing
 - Court orders
 - Gain information from parties
 - Disseminate information about mediator and mediation process to parties
 - Select location
 - Arrangement of furniture
 - Mediator's Introduction
 - Mediator introduces herself and parties/representatives
 - Describes the process and sets ground rules
 - SETS THE STAGE
 - Opening Statements by Parties
 - Uninterrupted presentation of their views
 - Fully express in own words how they view the dispute
 - *Ventilation-Optional*
 - *Important to allow individuals to vent*
 - Information Gathering
 - Mediator asks questions based on opening statements to obtain necessary additional information
 - Ask open-ended questions
 - Issue & Interest Identification
 - Mediator identify issues
 - *Agenda Setting-Optional*

- *If complex case, made need to determine order to deal with issues*
 - *Caucus-Optional*
 - *May meet privately with each party for option generation*
 - Option Generation
 - Move parties to generating ideas, options or alternatives that might resolve the case
 - *Reality Testing-Optional*
 - *Check with each side realistic possibility of attaining what hoped for*
 - Bargaining and Negotiation
 - Give and take assisted by mediator
 - Agreement
 - If agreement, mediator restates
 - Draft complete agreement or memorandum of settlement
 - If no agreement, mediator state where parties are, and note any progress made in the process
 - Closure
 - 2. Recent Adaptations and Modifications
 - Family law disputes and public policy matters-use multi-session approach
- D. The Role of a Mediator
 - Facilitator
 - Conductor of the negotiation
 - Role changes through process
 - Supervise (or parent) the parties
 - Teacher-assisting parties in learning the subject matter of their dispute, but also in teaching the process
 - Advocate (not for the parties) for process and settlement
 - Catalyst-moving the parties in direction of resolution
 - Orchestrators
 - Deal makers
 - Translations of comments and proposals
 - Concern: amount of influence mediator should have on the outcome of the case
 - Safeguard, maintain and control of the process
 - Parties control content matter of the dispute
 - *Parties are responsible for the content; mediator is responsible for the process*

Chapter Three - Mediator Skills

- Wide variety of skills required including:
 - Patience of Job
 - Sincerity and bulldog characteristics of the English
 - Wit of the Irish
 - Physical endurance of the marathon runner

- Important to be sensitive to feelings of others as well as yourself
- Demonstration of empathetic understanding is appropriate, but must remain objective and neutral
- **D. Human Behavior and Motivation: The Mediator's Role**
 - Much of mediator's work will involve motivating human behavior
 - Group dynamics
 - Figure out whether constructive or destructive with regard to resolving the matter
 - If destructive, try to influence group behavior and effect change in patterns of conduct
 - Try to recognize what elements can and cannot be changed

Chapter Four - Getting to the Mediation Table

- **A. General Appropriateness**
 - Mediation saves time and money
 - Specific factors that indicate case or matter is appropriate for mediation include:
 - Ongoing relationship that parties wish to maintain
 - Parties hope to establish ongoing relationship through mediation
 - Parties prefer to avoid a legal precedent
 - Parties have need for assurance of confidentiality about the nature of the dispute, the agreement or both
 - Exists a need for assistance in communication and information exchange
 - Parties demonstrate an inability to identify common interests
 - Parties and/or their advocates need assistance with the negotiation
 - Need for creativity in resolution
 - Parties express desire for self-determination
 - One or both parties (or their counsel) has made an unrealistic assessment of the case
 - Despite differences, there is a mutual superordinate goal of a mutually satisfactory resolution
 - Mediation appropriate in almost every case at least as a first step
 - Mediation may be inappropriate in following cases:
 - Client cannot effectively represent her best interest and is not represented by counsel
 - Client seeks to establish legal precedent
 - Significant person is unable to be present
 - Party is entitled by statute to attorney's fees (although mediation is still an alternative)
 - Strong business competition between the parties in concentrated markets
 - Threat of criminal action
 - One party wants to delay a resolution
 - Likelihood of bankruptcy
 - Discovery is needed (mediation could be postponed until after sufficient discovery)
 - Enforcement of the outcome will be necessary
 - Long distance or telephonic mediation is discouraged

- B. The Referral Process

o 1. Non-Legalized Matters

- Those disputes or conflicts which have not accessed the legal system
- a. Voluntary
 - Dispute resolution centers
 - Smaller cases - amount in controversy not great
 - Referrals via citizen complaint centers
 - Individuals not represented by counsel and usually not understand mediation process
- b. Contractual
 - Parties less hesitant about process
 - Include in the clause: matters which may be subject to disagreement at time dispute arises (includes time, place, and cost of mediation, identification of mediator and who will attend mediation)
- Devalk Lincoln Mercury, Inc. v. Ford Motor Co. (dealer and owner/manager sue manufacturer for termination of dealership; dealer's compliance with dispute resolution provisions did not excuse its failure to present the claim to the dealer policy board as condition precedent to filing a lawsuit)
- Weekley Homes, Inc. v. Jennings (agreement provided "Mediation of the disputes is an express condition precedent to arbitration of the disputes"; purchasers of home sued builder; builder tried to compel arbitration first-failed because did not fulfill condition)

o 2. Pending Cases: Public or Private Sector Mediation

▪ a. Mandatory Referral

- Initial issue: whether an individual in a dispute or with a claim can be compelled to go to mediation (whether courts have inherent authority to mandate referral particularly over objection of one of litigants)
- Keene v. Gardner (court did not have the power to require mediation and sanctions with following the 10 day objection period required by statute)
- Carmichael v. Workers' Compensation court of the State of Montana (injury occurred prior to new legislation requiring nonbonding mediation before a party may file a petition in the Worker's Compensation Court; this statute unconstitutionally impairs a contractual obligation)
- Participation that may be required:
 - o Good faith
 - o Exchange of position papers and other information
 - o Minimal meaningful participation
 - o Attendance with settlement authority
 - o Obligation to pay mediator's fee
- In Re: United States of America, Petitioner (United States was required to be represented at mediation by person with full settlement authority-not abuse of district court's discretion)
- Graham v. Baker (party attended mediation and participated to extent of stating that his position was not

negotiable; statute does not give mediation service power to compel either creditor or debtor to negotiate; this presence satisfied the minimal participation required by statute)

- Decker v. Lindsay (judge ordered personal injury suit to mediation-litigants could be compelled to participate despite objections, but litigants could not be forced to make good-faith efforts to settle case during mediation)
- Texas Department of Transportation v. Pirtle (motorist action for injuries sustained in one car accident; TDT won, but was required to pay mediation costs because failed to mediate in good faith-valid assessment of costs)
- Texas Parks and Wildlife Department v. Davis (park visitor sued for injuries sustained when concrete bench collapsed under him; visitor won and sanctions against the Department for failure to negotiate in good faith during court ordered mediation were not warranted)
- Larry R. Obermoller v. Federal Land Bank of Saint Paul (denial of debtor's application for temporary injunction to halt foreclosure sale of farm; farmer-lender mediation act does not impose a penalty when creditor fails to serve a mediation notice)
- What is good faith?
 - Does not mean reaching agreement
 - Does not obligate parties to possess a sincere desire to resolve the matter
 - Does not mean not having to disclose to the other participants or even the mediator everything about your case
 - Being nice is also not element of good faith
 - Suggested factors that might be included in rule compelling good faith:
 - Arriving at mediation prepared with knowledge of the case (facts and possible solutions)
 - Taking into account interests of other parties
 - Having all necessary decision-makers present at the mediation, not via a telephone
 - Engaging in open and frank discussion about the case or matter in a way that might set out one's position for the other to better know and understand
 - Not lying when asked specific and direct question
 - Not misleading the other side
 - Demonstrating a willingness to listen and attempting to understand the position and interests of other parties
 - Being prepared not only to discuss the issues and interests of client, but also to listen to issues and interests of all other participants
 - Having a willingness to discuss your position in detail

- Explaining the rationale why a specific proposal is all that will be offered, or why one is refused
 - **b. Cost Considerations**
 - Payment to mediator-one concern is neutrality
 - Be careful not to let it affect neutrality
 - Penalties or sanctions for non-compliance with mediation order are possible
 - **c. Voluntary Participation**
 - Difficulties may arise when one party advocates mediation for a wrong reason, such as a disguised opportunity for unstructured discovery
- **C. Issues of Timing: The Life of a Dispute**
 - **1. Non-Litigation Matters**
 - Sooner resolved, more positive impact on relationship
 - Unless hostility where discussion would likely lead to physical confrontation
 - **2. Legal Disputes**
 - Longer wait for mediation-more likely parties' will become entrenched in their positions and unmovable
- **D. The Role of the Attorney - Advocate in the Referral Process**
 - Some states strongly recommend that attorneys inform clients of ADR options
 - Some states may require ADR prior to setting case for trial
 - Attorney-counselor should discuss all possible options with client
- **E. Selection of the Mediator**
 - Parties more satisfied if they choose mediator rather than the court
 - **1. Matching Cases and Mediators-consider**
 - Case characteristics with mediator characteristics
 - Costs
 - Technical expertise required
 - Previous legal experience
 - Personality type
 - Mediator must be able to control situation but also be able to be quiet when appropriate
 - Medeiros v. Hawaii County Planning Commission (not essential to due process that appellants participate in naming the mediator; appellant's due process rights are protected so long as the selection process and chosen mediator are unbiased; appellants do not claim the mediators were biased or prejudiced and do not claim to have been prejudiced by the Commission's selection)
 - **2. Finding Mediators**
 - Established ADR provider list
 - Yellow pages

Chapter Five - Preparation for the Mediation

- **A. The Mediator**
 - Preparatory stage varies from a few minutes to several months depending upon nature of dispute and method of referral

- Often fast track preparation in community-based programs
- Can prepare in global way - be ready to listen carefully, analyze the case, remain neutral and provide environment for creative problem solving
- If private practice, can dictate nature of preparation - begin by asking three questions:
 - 1. What do you, as the mediator, want the participants to know prior to sitting down at the mediation table?
 - 2. What do you want to know about the case and the participants prior to beginning the mediation session?
 - 3. How the information exchange will be accomplished?
- **Preparation is mechanical and mental:**
 - **Mechanical** - logistics, housekeeping and administrative details
 - Neutral location
 - Room décor
 - Way room is arranged (seating arrangements)
 - Access to telephones
 - Food and beverages
 - Time allotted
 - If cancellation or postponement
 - Can have non-refundable deposit or cancellation fee
 - However choose to handle, address issue at time mediation is arranged
 - Determine mediation fee in advance
 - Pre-mediation correspondence
 - Provide information about mediation process and mediation, herself
 - Two views:
 - Less the parties know about what will happen, the better
 - More the parties know about the process in advance, the better
 - Most mediations fall between these two extremes
 - Typical packet of information includes:
 - Outline
 - Letter of administrative details
 - Other items participants should review
 - Disclosure of possible conflicts
 - Agreement or contract to mediate
 - Forms disclaiming mediator representation
 - Waiver of potential mediator liability
 - Confidentiality agreements
 - Evaluation forms
 - May ask for written overview of the case from the parties
 - Need to encourage participants to be prepared as well as help assist mediator to be prepared
 - Assure that everyone is necessary for a binding decision is present at the mediation table

- Parties must be ready to listen
- Decision maker in mediation is not the neutral party-persuasion or advocacy, if it takes place, should take place across the table

Chapter Six - Beginning the Mediation

- A. The Mediator's Introduction

- Establishes tone and tenor of mediation
- Vehicle to build trust with participants
- Assume mediation will be new experience for participants
- Should closely resemble a conversation
- Set stage by exhibiting enthusiastic, positive and encouraging attitude
- **1. Purpose**
 - To inform the participants about what is going to happen
 - Time for parties to relax and feel more at ease with surroundings, mediator and process
 - Let participants know that mediator is in control of mediation process
 - Mediator establishes his credibility and demonstrates knowledge of the process
 - Set any ground rules
- **2. Content**
 - Introduction of all parties sitting around table and introduction of mediator
 - Confirm parties have adequate authority to settle the matter
 - Discuss any potential conflicts
 - Ensure everyone is in agreement to participate
 - Any documents should be finalized
 - Discuss benefits of mediation process
 - Discussion of mediator's role in the process
 - Brief procedural outline of the process
 - Specific ground rules explained
 - Against interruptions
 - Suggested time limits
 - Excepted time commitments
 - Rules governing confidentiality
 - Explain caucus process and confidential provisions
 - Request of commitment by participants to a good faith effort at settlement
 - Take care of housekeeping details
 - Possibly summarize mediator's understanding of the case (unless time constrained)

- B. Opening Statements

- Remember not to bring any presumptions about the case based on information previously received
- Offers all participants the opportunity to take part in information gathering process
- If pending lawsuit-plaintiff should start (unless D's counterclaim is primary focus of mediation)

- Important to have clients participate and make known that the case belongs to the clients and not the lawyers
 - Decision making - should be left to clients
 - Attorney roles vary - include:
 - Non-participant
 - Silent advisor
 - Co-participant
 - Dominant or sole-participant
 - Some states have statute that allow the mediator to exclude the lawyer from the mediation
- Avoid ex-parte telephone calls with any participant-use conference call format
 - This will assure actual, as well as perceived neutrality of the mediator

▪ **Mental**

- Not necessary to know and memorize in advance each factor or legal argument that parties might propose at mediation
- If lawsuit pending, mediator should know the status of the case as well as status of any pending motions or deadlines
- Any resolution reached at mediation should not conflict with any court order
- Try to avoid making any prejudgments about the case
 - Rid self of all preconceptions of opinion and adopt a non-judgmental state of mind
- Prepare to be patient
 - Prepare to not allow a desire for a faster pace to impact the disputants full ability to express their feelings or describe the dispute
- Get ready to focus completely on the dispute and be able to avoid any other distractions or commitments
- Commit to actively listen to comments of all participants
- Pledge to search for underlying interests
- Don't begin process overly optimistic or pessimistic

- **B. The Parties and Their Representatives**

- Before mediation, each side should gather its representatives, decision makers and legal counsel for strategic planning session
- If public policy involved, meeting of all constituents should take place prior to mediation
- Clarify goals and objectives and discuss how plan to achieve them in mediation
- Mediation should be future oriented-focus on how the matter will be resolved
- Consider use of documentation such as charts, graphs or video tapes in advance
- Participants should be encourage to engage in preliminary discussion of options
- Remind parties to maintain an open mind
- Encourage consideration of goals, objectives and interests of other side while preparing for mediation

- Party's decision is strongly influenced by the mediator's presentation of selected information to each party to close the deal
 - Mediator highlights the risks over any other kind of information
 - **Information or assisted autonomy**
 - Mediator acts as information conduit
 - Party's have means to exercise control after receiving technical expertise
 - Mediator assists parties in exploring individual values
 - **Deliberative or reflective autonomy**
 - Mediator provides parties with same factual and legal information described in the informative model, but also helps the parties understand, articulate and choose the values that should govern their ultimate choices
 - Mediation process is not concerned with achieving conformity to broader societal norms, but rather to creating individual norms for the parties themselves
 - **Questions**-remains personal choice for mediators:
 - Each individual has certain values-should a mediator be concerned with whether the results are fair?
 - If one party clearly more knowledgeable, should the mediator intervene and provide the requisite knowledge to the other party?
 - Community of numbers-does the mediator have any duty in these instances to compensate by limiting the amount of time for discussion to equalize the real or perceived imbalance?
- **B. Debating the Duty of the Mediator**
- Fundamental questions about court mediation concern fairness
 - Presumably, parties represented by lawyers would have relevant legal knowledge, but most un-represented parties are at the short end of the stick
 - Variance over mediators role-between:
 - Disinterested referee and
 - Empowered specialist
 - Debate-should mediators guarantee fair agreements
 - Also, what types of legal assistance can the mediator provide/offer?
 - Legal information
 - Some are simple questions that could be answered by county clerk
 - Other questions require legal counsel
 - Any other questions have no clear answers
 - Large policy questions remain
 - Informational
 - Relating to specific areas of the law
 - Also ask for ultimate issues and probable court outcomes
 - Questions related to strategy and tactics
 - **Bottom line:** mediator must maintain neutrality and impartiality in:
 - Balance and conduct of the negotiations which she facilitates (i.e., the process)
 - Ultimate result or outcome of the mediation

- Timing and method of presentation vary
 - Determine specifics in advance of session, if possible
- Use of charts, graphs or drawings for explanations - encouraged during follow-up stage instead of opening unless visual aids essential to the opening
- **C. Follow-Up Information Gathering**
 - Issues usually not all identified in opening statements, therefore don't move directly into option generation
 - Because once start generating options, parties have a tendency to not want to share any more information
 - **1. Effective Questioning by the Mediator**
 - Mediator's role is to continue to gather information not only for own behalf, but for behalf of other parties
 - Ask at least three open-ended questions
 - **a. Open-Ended Questions** - allow for the broadest possible answer (can be focused or more focused)
 - What do you think?
 - Tell me more about...
 - Could you explain...
 - Please explain further about...
 - How did you feel when...
 - What happened?
 - Is there anything else that you believe is pertinent to...
 - **b. Open-Focused Questions** - focused questions consist of requests for information similar to general open question, but is more directive
 - How did you feel when you first learned that...?
 - Why do you want to continue a business relationship with X?
 - What happened after you first noticed...
 - Describe the kind of streets that are at the intersection.
 - **c. Requests for Clarification** - open to a degree but are even more focused than the two preceding types of questions
 - Could you explain to me how your product is not similar to product Y?
 - Help me understand why the lawnmower is not worth x.
 - What specifically about your health is your main concern?
 - **d. Leading Questions** - suggest the answer often in terms of one or two words
 - What color was the car that hit you?
 - **e. Either/or, Yes/No Questions** - close ended
 - Were the headlights either too bright or too dim?
 - Tell me, yes or no, do you want to be friends with Steve?
 - **f. Compound Questions** - more than one request for information and should be avoided
 - **Questions should be as neutral as possible**-however, is likely that some questions will elicit judgmental, value-laden information from the parties
 - Judgmental response language types:
 - Should or have to - aimed at other side or party itself

- Explain rationale for choosing party to start
 - If no litigation yet-start with party making the complaint (one responsible for getting issue to the mediation process)
- Begin with broad request for information - "Tell use what brings us here today."
- **1. Importance of Opening Remarks**
 - First time parties actually listen to an uninterrupted statement of the case from the other side's point of view
 - First opportunity to get it off their chests
 - Important for mediator to be patient and model good listening skills (will encourage others to listen as well)
 - Pay close attention to non-verbal communication of the non-speaking parties
 - No one should interrupt the speaker during time reserved for opening remarks
 - Unless very confusing and if develops into negative exchange - then appropriate for mediator to intercede and take control
 - Disagreement is expected
 - Mediator should not call attention to potential conflicts, but should be mindful of them and possibly address them in private sessions
- **2. Parties**
 - Individual's day in court
 - Ventilation, expression of anger, frustration and other emotions should be encouraged
 - If confused about opening statement, ask for clarification when party complete with statement
- **3. Attorneys**
 - If attorney attends mediation, there is usually a lawsuit pending
 - Lawyer should be attending to represent best interests of client
 - Possible conflicts include financial interest and interest in establishing a trial record
 - Some lawyers utilize adversarial approach in opening statements- mediator should attempt to constrain some of this prior to presentation
 - Stress that mediation is different than the adversarial setting of the court room
- **4. Other Representatives**
 - May include friends, relatives, accountants, financial planners, therapists, counselors
 - Offer supportive role or attend in active representative capacity
 - Mediator should understand how much decision making authority the representatives have
 - May be given opportunity to make opening statement
 - May need translators - try to get neutral party, but may not be possible
 - However, request and accurate and direct translation be provided
- **5. Use of Documents, Witnesses, and Experts**
 - May use documents, witnesses, and experts to clarify certain points

- Limiting - party closes himself to certain options or ideas
 - Blame - one person blames the other for the event
 - Value - assign value to an activity (right or wrong)
 - Assumptions based on inferences
- Mediator should refrain from commenting on judgmental responses
 - Mediator should try to neutralize this language when being a summarization
- **2. Additional Information Gathering by Participants**
 - Parties are often present to only gather information about the other side's view of the case
 - Parties can better assess their cases for purposes of settlement
 - Mediator should permit questioning to take place between parties across the table
 - Mediator should stay in control

Chapter Seven - Neutrality

- A. Overview

- Mediator must remain neutral before during and after mediation session
- Neutrality is not very well defined
- Often used interchangeably with a variety of other words and phrases:
 - Impartiality
 - Free from prejudice or bias
 - Not having a stake in the outcome
 - Free from conflict of interests
- Other synonyms include:
 - Unbiased
 - Indifferent
 - Independent
- Dissension among mediation community whether these terms really define neutrality
- Mediators generally viewed as neutral-but there may be an underlying duty to be fair
- Some believe mediator just needs to separate her opinions of the outcome of the dispute from the desires of the disputants
- Mediators may have to provide information and educate participants to help them be better able to make informed decisions-**four models of autonomy**:
 - **Paternalistic or dictated autonomy**
 - Mediator acts primarily as parties surrogate in assessing what outcome might be best
 - Party's decisions supported by the mediator's presentation of selected information as well as by the mediator's explicit opinion of what should be done
 - **Instrumentalist or limited autonomy**
 - Party's objective is simply to reach settlement

- Positive reinforcement is a powerful motivator for most individuals
 - Mediator should always try to point out the positive aspects he sees in the dispute
 - Because mediator in objective chair, he is more likely than any of the parties to see some middle ground or to observe that there is not as much disagreement as each side may initially perceive and to identify areas of overlapping interests (such as supplier/purchaser or best interests of the children)
- After mediator restates, he may ask each of the parties to restate what they think the other party has said
 - Other mediators may request that the participants do all of the restating
 - This may be done by asking each party to restate the opposing view before they put forth their response, position or statement
 - Use caution with this approach because many individuals may be uncomfortable with this approach and mediator may lose trust and cooperation
- Usually try to avoid single issue cases - more likely to lead to positional, distributive negotiation
 - Mediator can try to fractionalize the issue (break into smaller components, to create more items for discussion and bargaining)
- Mediator must careful to not make a premature assessment that he has reached the conclusion of information gathering
 - Early determination of issues can also be limiting
 - Since these items are subject to change, mediator must never close his mind to additional issues as the process continues
- **B. Setting the Agenda**
 - Mediator should approach agenda setting and discussion of issues in way that can minimize the dispute
 - Sometimes matters not complex-mediator does not need to consider agenda options
 - Different approaches to agenda setting:
 - **Ad hoc**
 - Mediator proposes examination of an issue as it is discussed
 - Parties analyze it thoroughly until they reach a resolution
 - **Simple agenda**
 - Used if one main issue
 - Primary item is dealt with and settled before discussion of others is commenced
 - Not applicable if a number of issues with varying importance or if have contingent issues
 - **Alternating choices by the parties**
 - Allows parties to alternate choosing the topic of discussion
 - Provides parties control of the process
 - Choosing who goes first can be problematic
 - Works well where parties are experienced negotiators and level of conflict is minimal

- 1. Process
 - Fairness in negotiation process has four components: Structural, process, procedural and outcome fairness
- 2. The Result
 - Even if balance at mediation table, parties may reach outcome that mediator believes is unfair and unbalanced
 - Mediator should ensure against an agreement tainted by fraud, duress, overreaching, imbalance in bargaining leverage or basic unconscionability
 - But questions because judges and juries differ-therefore how could mediator make this call
 - If such standards are established, will accurate predictions lead to an increase in claims of mediator malpractice
 - If parties are satisfied and no illegality, agreement should be executed
 - If mediator feels that may attempt to influence outcome-should not take the case

Chapter Eight - Identification of Issues and Interests

- Stage called issue identification or issue determination
 - These matters usually have not been disclosed by this stage
 - Therefore, mediator should initially focus on identification and restatement of main or apparent issues
 - Recommended that mediator have parties together for this stage - allows both parties to hear the other parties' issues expressed (puts them in a position to better understand that different issues exist for each side)
 - If do caucus, usually the issue is confidential (issues need to be openly discussed in order to be resolved)
 - Once issues identified, mediator should restate and reframe them in way that will leave parties open to a variety of potential solutions
 - Once obtain party agreement o specific issues, mediator should determine an agenda for mediation, particularly in complex cases
- A. Identify, Reframe and Restate: The Use of Language
 - Restating and reframing - key tools for mediator
 - Restate - stating a few sentences in a way that reflects what the speaker said, but with a slight change of focus, or removing offensive language
 - Reframe - statement about the problem or issues and is used to help the parties to view the problem or concern in a different light
 - Often removes statements of direct blame
 - Convert to neutral language and broad view of the issues - parties often then become open to more creative problem-solving approach
 - These tools let the parties know that they have been heard and understood by the mediator; will also assist others at table hear the other point of view
 - Can use the one issue approach if the issues are not complicated
 - This method completely resolved each issue raised prior to identification of new issues

- **Principled**
 - Mediator and parties establish general principles that form the framework for the settlement
 - Specific details of how these principles will be applied to specific issues then follows
 - One example is in the business context: parties agree in principle to renegotiation of a contract (specific contents are then addressed)
- **Less difficult first**
 - Mediator identifies those issues where probability of agreement is high
 - For these easy items, parties move quickly to resolution at the beginning of the agenda
 - Reaching early agreement on some matters promotes an atmosphere of agreement
 - Risk: if final agreement is not reached, the parties will feel as if the mediation has resulted in a waste of time and money
- **Most difficult first**
 - Likely other issues will fall into place
 - Risk: can result in early termination of the session if agreement is not attained
- **Order of importance**
 - Parties with mediator choose the most important items for each of them to be placed first on the agenda
 - These are likely the primary source of conflict and therefore the most difficult
- **Building-block or contingent agenda**
 - Mediator identifies issues which must be dealt with first because they provide the groundwork or foundation for later decisions
 - Parties must clearly express and understand the contingent nature of the issues
 - In cases where the issues are interrelated, this approach can prevent deadlocks due to incorrect sequencing of issues
- **Tradeoff or packaging**
 - Parties unwilling to move on a single issue will often use combination of issues
 - Offers are made in return for concessions
 - Trading can also be conducted on an issue by issue basis so that all issues are eventually resolved
 - Packaging of proposals which contain multiple-issue solutions can be particularly effective where the issues are linked

Chapter Nine - The Negotiation Process

- A. General Overview

- Negotiation is much like sex---something most of us do at various points in our lives, yet no one has taught us anything, nor is there much open discussion about it

- Negotiation is at the heart of all settlement-it is part of everyday life
- Six stage model of negotiation:
 - Planning and preparation
 - Establishing initial relationships between negotiators
 - Opening offers or initial proposals
 - Information exchange
 - Narrowing of differences
 - Closure
- More detailed model:
 - Preparation and planning
 - Ice breaking
 - Agenda control
 - Information bargaining
 - Proposals, offers, demands
 - Persuasion/justifications
 - Concessions/reformulations
 - Crisis: resolution or deadlock
 - Closing
 - Memorialization
- **B. Negotiation Theory-negotiation methods**
 - **Distributive**
 - Zero sum game-where there is fixed quantity of resources, one person's gain is necessarily the other's loss
 - Direct conflict of interest between the parties
 - Adversarial competitive style is most often observed
 - Ex. two partners negotiate how to split a monthly profit
 - **Integrative**
 - Exploration of a number of options
 - Expanded pie - provides an opportunity for mutual gain in negotiation
 - Interests of parties are not necessarily in direct conflict and therefore, there is not an inverse level of satisfaction inherent in the process
 - Room for creativity and a collaborative problem solving approach is usually observed
 - **Positional (similar to distributive)**
 - Parties align themselves to a position and spend effort defending it against attack
 - Parties sometimes do not focus on what they really want
 - Hard style negotiators are adversarial and confrontation, but this style has soft style of friendly, cooperative manner
 - Soft negotiators often yield and concede to avoid confrontation
 - **Principled (similar to integrative)**
 - Attempt to identify underlying interests and come up with number of alternatives for settlement
 - Looks for possible solutions which might satisfy everyone's interest, with the objective being a final resolution with which everyone is satisfied

- **Interest-based** (similar to principled)
 - Look to underlying interests of parties
 - Also known as mutual gains bargaining
- **Rights-based** (similar to positional)
 - Look to entitlement of rights between the parties in an attempt to determine a solution based on those rights
- **Win-Lose**
 - Similar to distributive or positional
 - One party will win and get more, while the other party necessarily gets less
- **Win-Win**
 - Usually when use integrative, principled or interest-based process - get joint gain and mutual satisfaction
- Many mediators recommend the integrative, principled approach
- **C. Common Styles and Tactics**
 - Highly effective negotiators have traits including preparation, adherence to ethical guidelines, trustworthiness, and honesty
 - Negotiator should weigh carefully both the pros and cons of use of these tactics
 - **Some common strategies include:**
 - Use of additional individuals on the negotiating team
 - Making an initial large demand or low offer
 - Negotiating with limited authority
 - Displays of real or feigned anger/intimidation
 - Making false demands
 - Proposing "Take it or leave it"
 - Creating/inducing guilt
 - Acting like Mutt and Jeff
 - Claiming alleged expertise/putting on a snow job
 - Using a Brer Rabbit-like reverse psychology
- **D. Common Problems in Negotiations**
 - Lack of knowledge or skill about the process
 - Lack of preparation and planning for negotiation contributes to very haphazard approach to process during mediation
 - Parties' lack of specific focus or ability to keep on track
 - Parties may have failed or refused to exchange information
 - Without information, informed decisions cannot be made
 - Intermediary may assist in this exchange
 - Help overcome myth that making the first offer is a sign of weakness
 - Inability of some parties to take responsibility for finding a solution
 - Some people mistakenly believe that there is a single "right" answer to any dispute or problem
 - **Four barriers**
 - Strategic barrier - suggested by game theory and economic analysis of bargaining
 - Relates to tension between discovering shared interests and maximizing joint gains AND maximizing one's own gains where more for one side will necessarily mean less for the other

- Principal/agent barrier - principals often do not negotiate (they act through agents)
- Cognitive barrier - relates to how human mind processes information, especially in evaluating risks and uncertainty
- Reactive devaluation - draws on social psychological research
- **Ways that neutral third parties might help overcome each of these barriers:**
 - Strategic barrier
 - Neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary
 - Skilled mediator can often get parties to move beyond political posturing and recrimination about past wrongs and to instead consider possible gains from a fair resolution of the dispute
 - Principal/agent barrier
 - Mediator may help bring clients themselves to the table and help them understand their shared interest in minimizing legal fees and costs
 - Cognitive barrier
 - Mediator can help each side understand the power of the case from the other side's perspective
 - By emphasizing the potential gains to both sides of the resolution and de-emphasizing the losses that the resolution is going to entail, mediators often facilitate resolution
 - Reactive devaluation barrier
 - Can be sidestepped if the source of a proposal is neutral-not one of the parties

- **E. The Mediator as Conductor for a Negotiation Dance**

- Negotiation can be seen as a dance
 - It takes two to tango and to negotiate
 - In both, some individuals go more willingly than others
 - Like two dancers, negotiators may proceed very quickly and deliberately, certain of their direction and steps
 - In other instances, they may hesitate or step on each other's toes
- Mediation provides environment in which an offer is not only acceptable, but also expected
 - This removes the negotiation stigma that unfortunately has been attached to making the first move
 - Mediator's role in this regard is not to only encourage movement by the parties, but also to encourage the parties to negotiate more reasonably
 - Tempo of the music or timing of the offers, can also be directed by the mediator
- In a neutral, objective role, the mediator is more able to recognize alternatives or options as possible solutions which might be likely to satisfy all the parties at the table
 - Often, the parties may reject these ideas and refuse to continue dancing
 - Mediator may point out the similarities in music and dance steps

- and help the parties continue
- If negotiators grow tired, the mediator can assist in moving them- she keeps the music playing

Chapter Ten - Finding a Resolution

- Mediator needs to provide guidance of the process of problem solving
- Finding resolution is key to the goal of finding and agreeing on a solution which all parties will be able to live and in which all parties can find at least some satisfaction
 - o If participants find and agree to solutions-solutions are generally more satisfactory to disputants because they are crafted in a way that accomplished the goals of both parties
- **A. Overcoming Reluctance With Problem Solving**
 - o People often assume there is one solution and their focus is narrow and restrictive
 - o But, disputes involve many people with different feelings-therefore everyone has own idea for a solution and collaboration in developing options does not come naturally to most
 - Therefore, mediator's task is to move parties away from searching for single, right solution-broaden the parties' perspectives
 - o Each person must share responsibility of collaboration and responsibility for process
 - o Helpful if mediator explains difference between trial and mediation
 - Trial - focus is on the past
 - Mediation - focus is on the future
 - o To help parties not immediately try to resolve dispute:
 - Allocate "thinking" time
 - Restatements in broader terms
 - Focus on future benefits of amicable solution
- **B. The Caucus**
 - o Mediator meets privately with each party or combination of parties
 - Because parties not always candid in front of all participants
 - Benefits:
 - To gather additional information or to explore alternatives
 - Allows party to vent in private and avoid damaging relationship between the parties
 - Prevents one party, or an attorney, from manipulating another
 - Provides other party down time to relax or to gather additional information necessary
 - Difficulties:
 - Perception of alliance of bias based on time spent with each party
 - Greater potential for mediator to become biased
 - Important for parties to engage in joint problem solving
 - Effective if parties are hostile and unable to generate options
 - Confidential and mediator shares only information she has been given permission to divulge
 - Some cases - opposite-cant transmit any information he

determines to be helpful to the process, unless specifically told otherwise by the party

- Strategies:
 - Assist parties in evaluation of the case
 - Urge participants to take realistic look at their objectives
 - Educate parties about negotiation process
- **C. Impasse, and the Ways Beyond**
 - Tools to get past roadblocks:
 - Change focus or topic
 - Start over
 - Divide or break down the issues
 - Take a break
 - Be silent
 - Discover or remind parties of their BATNA
 - Use words of encouragement
 - Call a caucus
 - Come back together
 - Bring in snacks
 - See if partial agreement can be reach
 - Use humor
 - Turn to outside experts
 - Call it quits
- **D. Problems in Generating Alternatives**
 - Many hesitate to advance ideas for resolution
 - From apprehension and fear of rejection of offered ideas or fear ideas will be criticized or not accepted
 - Emotional aspects often impair willingness to hear or trust the content of any option generated by other side
 - Mediator's task - create environment where parties are no longer reluctant to generate or identify a variety of options for settlement
 - Encourage parties to be more willing to explore suggested ideas
 - Mediator can:
 - Explain that essential part of mediation process is to identify and consider all options
 - Judgment can hinder imagination, so separate the inventing from the deciding
 - Not rush critical stages
- **E. The Importance of a Number of Options**
 - Payment of money often viewed as solution to problem
 - However, there are a variety of alternative that might be suitable
 - Important that parties be open-minded to broad range of possible solutions
 - Even though parties may want to complete their opening statement with a demand-mediator should explain that there will be time later for examining a number of options
 - Devote a phase to allowing exploration and creative thinking to occur
 - Parties will be better able to fashion a resolution with which they are truly satisfied because they have a direct hand in creating it
 - Creation or identification of options and alternatives is separate from the actual selection process-brainstorming session

- Usually is a direct relationship between the number of options available and the likelihood of attaining a final resolution
- **F. Use of Lateral Thinking**
 - Thinking is a skill-some are better at it than others
 - Thinking slowly and deliberately can increase the effectiveness of the thought process
 - Lateral thinking defined in dictionary as “pattern switching within a patterning system”
 - Is an attitude and set of skills
 - Mediators must at least possess the attitude
 - Way of looking at things with insight, creativity and humor
 - Used to generate new ideas or invention
 - More deliberate than creativity
 - Allows jumps in different directions and nothing should be excluded from consideration
 - Final result is unpredictable
 - Complementary with vertical thinking - after lateral thinking to formulate all ideas, use vertical thought process to select and the ideas to their best use
 - Be careful to avoid making statements that favor or focus on specific solutions prematurely
 - Remind parties that mediator’s role is to assist the parties in creating their own solutions
 - Mediator can still be thinking of options and as last resort if parties unsuccessful
 - Be careful not to allow the parties to see the suggestion as the answer - suggest them as possible ideas
 - Number of options generated will depend on case and its appropriateness for creative solutions
 - Suggestion of one idea may stimulate another
 - Mediator remind parties that just because one individual puts forth an idea, that person does not own it or that the party suggesting the idea even agrees with it
 - Mediator should not indicate feelings or judgments of any ideas
 - Option generation may be hindered using the caucus format
 - However, parties may be more likely to disclose their true interests and therefore bring out options which are workable and acceptable
 - Need for apologies
 - Often has a positive effect
 - Plaintiff’s lawyers usually shrug off client’s desire for an apology
 - Defendant’s lawyers steer clear of any expression that might be construed as an admission of liability
 - If concerned about client satisfaction-should strongly consider demands for apologies
 - Four variations for apologies with “I’m sorry” as the common denominator
 - Tactical apology.- attempt to build a relationship in order to influence opponent’s bargaining behavior
 - Fundamentally competitive, not cooperative
 - Explanation apology - mock regret to rebuff an accusation

- and then generates an account to defend past behavior
 - Sarcastic apologetic gesture may acknowledge the other party's feelings, but it avoids implicating the speaker in a wrongdoing
 - Formalistic apology - restoring social harmony is the most important goal of dispute resolution, well performed gestures of submission like the formalistic apology may result in absolution
 - Happy-ending apology - parties may engage in sort of tearful reconciliation that signals the happy-ending
 - Hearer should be convinced that the speaker
 - Believes she was at least partially responsible
 - For an act
 - That harmed the hearer and
 - Feels regret for the act
- **G. Selections of Alternatives**
 - "You can't always get what you want ... But if you try, sometimes, you just might find, you get what you need"
 - Proceeds naturally after brainstorming complete
 - Evaluate alternatives
 - Choose one as a solution
 - Mediator should review and clarify all elements of the solution - ensure everyone has same understanding about components
 - Then can finalize the agreement

Chapter Eleven - Confidentiality

- **A. General Policy Considerations**
 - Trust is element of mediation closely related to confidentiality
 - Establishing trust between participants and mediator is at core of process-there will be more disclosure of important information and personal needs
 - In separate and confidential caucuses
 - Parties more willing to make disclosures and openly discuss their underlying interests, needs, wants, and desires only if the process is confidential and items discussed are protected
 - Confidentiality important to mediator neutrality-if can report to another entity, there will be perception of affiliation with that entity
 - Confidentiality limits mediator's involvement in continuation of the case
 - Since mediators are prohibited from disclosing anything that happened in the mediation, parties might misuse the session to delay trial
 - However, may be against public policy to preserve confidentiality-if matters affect general public or environment
 - May have duty to disclose if someone may be physically harmed
 - Duty to report child abuse
 - Texas confidentiality provisions:
 - Process issues relating to what extent confidentiality is necessary

to achieve the objectives of ADR within the context of the particular dispute

- Need to encourage parties to speak freely in mediation
- Public access issues relating to claims of overriding public interest in insuring public access to information communicated in ADR proceeding
 - Issue that glare of public scrutiny promotes proper procedures and militates against settlements that are contrary to public interest

- **B. Exclusion or Privilege**

- If statute provided for confidentiality in mediation-courts will often uphold it
- Extremes:
 - Secret-means not to be disclosed to anyone-ever
 - Confidential-means mediation is protected from disclosure to the court, but it can be disclosed to the rest of the world
- Middle approach:
 - Only participants plus individuals directly related to and affected by dispute, will know about the case and details of mediation
- **1. An Exclusion - Scope and Limits**
 - Federal Rule of Evidence 408 - prohibits use of settlement offers as evidence of liability in trial of lawsuit-encourages settlement agreements
 - Parties would hesitant to engage in settlement negotiations if something stated could be used against them in a subsequent trial
 - Silent on whether information disclosed in a compromise discussion could be discussed with other entities, including the press
 - Excluded if used to prove the validity or invalidity of a claim or amount
 - Statements can be admitted if offered for other purposes
- **2. Privilege**
 - Involve parties in a relationship and generally prohibit disclosure by one party of information revealed by the other
 - May prevent disclosure for any purpose
 - To determine a claim of privilege against disclosure, four-part test (Wigmore):
 - Requires that:
 - Communications must originate in confidence that they will not be disclosed
 - Element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties
 - Relation must be one which in the opinion of the community ought to be sedulously fostered
 - Injury that would ensue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
 - For mediation, met using a balancing test

- Question of who the privilege is held by-mediator and/or participants?
- **C. Confidentiality Agreements**
 - Non-litigation - likely that courts would enforce a confidentiality agreement unless other laws mandating disclosure take precedence
 - Must be a threatened or actual disclosure before court will intervene
 - Agreement does not guarantee protection
- **D. Court Orders**
 - Courts can order parties to maintain confidentiality, specifically through a protective order
- **E. Discovery Considerations**
 - Can exempt from protection matters otherwise discoverable
 - Fact that it is discussed in mediation does not protect it from discovery
- **F. Duties to Disclose**
 - Some claim that mediator's duty to preserve confidentiality is paramount
 - If criminal D needs testimony of mediator as a defense, court may require mediator's cooperation
 - Duty to report child abuse
 - Identify to whom the disclosure should be made (who does the mediator owe the duty to)
 - Determine type and degree of disclosure should be made (extent of disclosure)
 - General duty to report crime (protect others from potential harm)
 - Each mediator will have to make independent judgment call on many of these issues
- **G. Current Legal Parameters**
 - **1. Generally**
 - **National Labor Relations Board v. Joseph Macaluso, Inc.**
(NLRB ordered employer to execute contract and pay back compensation with interest; NLRB sought enforcement of its order)
 - **Held:** NLRB can revoke the subpoena of a Federal Mediation and Conciliation Service mediator capable of providing information crucial to resolution of factual dispute solely for purpose of preserving mediator effectiveness)
 - **United States v. Gullo** (Ds charged with participating in use of extortionate means to collect, or attempt to collect, extension of credit brought motions to dismiss indictment and various other pretrial motions)
 - **Held:**
 - 1. Statements made during dispute resolution process at community dispute resolution settlement center in NY State were privileged and would be suppressed
 - 2. Revelation of privileged matters to grand jury did not require disclosure of minutes of grand jury proceeding
 - **Hudson v. Hudson** (dissolution proceedings - court entered final judgment of dissolution and denied husband's motion to vacate that judgment)
 - **Held:** former wife's introduction of mediation proceedings

into dissolution trial violated letter of mediation statute and required vacation of judgment and new trial

- **Schneider v. Kreiner** (after former husband and his former wife reached voluntary settlement in child custody matter before Municipal Court Private Complaint Mediation Service, husband requested access to entire mediation file-Service denied the request and husband petitioned for writ of mandamus)

- Held: mediation complaint completed by mediation was “mediator communication”, disclosure of which was precluded

- **In re: Grand Jury Subpoena Dated December 17, 1996** (individuals who had participated in mediation session under an agricultural loan mediation program sought to quash a grand jury subpoena served on program’s custodian of records that demanded information relating to the session-court quashed the subpoena and government appealed)

- Held:

- 1. Individuals had standing to challenge the subpoena
 - 2. Issue was not moot even though the information had been turned over the grand jury
 - 3. No evidentiary privilege existed against disclosure of information to the grand jury

- **Folb v. Motion Picture Industry Pension & Health Plans** (former employee of pension and health plans brought suit against the plans, claiming that they discriminated against him on basis of gender, and that they relied on a complaint that he had sexually harassed another employee as a pretext to discharge him in retaliation for his whistle-blowing activities regarding plan directors’ alleged violations of fiduciary duties under ERISA; employee objected to judge denying his motion to compel production of documents)

- Held:

- 1. Federal law of privilege governs both federal and pendent state law claims in federal question cases, and federal courts should not look to the law of the forum state as a matter of comity
 - 2. Federal mediation privilege applies to all communications made in conjunction with a formal mediation proceeding
 - 3. Allegedly harassed employee did not waive that privilege

- **In re Waller** (attorney disciplinary proceedings - falsely and with intent to deceive, stated to court that he had previously lied to a court-appointed mediator about his representation of a third-party (a surgeon) and about his reason for that lie)

- Held (based on report and recommendation of Board of Professional Responsibility):

- Misrepresentation to court warrants suspension from practice of law for period of 60 days

- H. Conclusion

- Most important task for mediator and mediation advocate is to determine

status of law with regard to confidentiality

- Be very careful to clarify the limits and extent of confidentiality with all participants

Chapter Twelve - The Mediated Agreement

- Final settlement should not be full measure of success
- **A. Finalizing the Mediated Agreement**
 - Mediator should have notes identifying all interests, issues, options and agreements
 - Therefore, important for all to be active in finalizing the agreement and assuring that all of the items previously identified have either been addressed or purposefully disregarded
 - Three elements of satisfactory agreement:
 - Procedural satisfaction
 - When each party has actually participated fully in the process or feels that she has been provided the opportunity to participate without pressure
 - Psychological satisfaction
 - Opportunity to be heard and to express their anger, frustration, disappointment, sadness or other emotion
 - Substantive satisfaction
 - Mediator has identified interests of each party and those interests are satisfied
 - **1. Pressures to Settle**
 - From judge by its mere referral of pending lawsuit to mediation process
 - From mediator-difficult to determine how far to go in motivating the parties to settle
 - Assist in reality testing by stating that court may be displeased if this case does not settle
 - **2. Contents of the Agreement**
 - Main reason for failure to comply with mediated agreement is lack of clarity in final agreement
 - Ask: CAN IT BE DETERMINED, FROM READING THE AGREEMENT ALONE, WHO WILL DO WHAT, WHEN, WHERE, HOW AND HOW MUCH?
 - If answered affirmatively, mediator's job is complete
 - If not answered affirmatively, must continue to clarify issues
 - Mediator helps assist parties in determining if what they are intending to agree to is really possible and how exactly it will be carried out
 - If reality testing sensitive (involves finances) - meet with parties separately
 - Controversy over whether mediator has duty to assure that the agreement is fair
 - Must determine specifics of implementation, which may include:
 - Specific date for each monthly payment
 - Location where payment is to be made
 - How payment is to be made - i.e., mail, in person, etc.

- Whether personal check, credit card, etc.
- Be careful not to include in the agreement a provision which requires an action on the part of someone who is not present at the session (could first verify with third party by telephone)
- Mediator should help with examination of contingencies
 - Assist with identification of potential problems and finding alternative courses of action
- Do not include recital of fault
 - Because of...
 - Due to...
 - As a result of ...
- **3. Partial Agreements**
 - Can have-be flexible when finalizing the agreement
 - Can have statement of general intent to agree, or an agreement in principle, which leaves specific details to be worked out at a later date
 - Mediator should be able to recognize, identify, and clarify a partial agreement-may include specifics of reschedule date
- **4. Form of the Agreement**
 - Depends on nature of case and whether or not lawsuit is pending
 - Self-executing agreement - carried out completely at time of agreement
 - Related to enforceability
 - Some statutes require a valid contract for mediation to be enforceable
 - Consider form in terms of parties and their needs and also in light of enforceability issues
 - Least formal - oral agreement
 - Mediator must restate what the terms of the agreement are, and perhaps even have the parties state to each other what they agree to do
 - Mediator responsibility to take detailed notes so that he can rely on these notes to firm up all details
 - Agreement in principle - arrive at general agreement which includes further details that need to be worked out at a later time
 - **a. Non-Litigation Cases**
 - Attorneys usually not present
 - Possible to utilize oral agreement
 - Assure have written enforceable contract
 - **b. Pending Lawsuits**
 - Must determine effect of mediated agreement on lawsuit
 - Dismissal of lawsuit
 - Finalization of lawsuit in terms of an agreed judgment
 - Incorporate mediated agreement into final papers or judgment of case
 - Continuation of lawsuit with certain stipulations
 - Court approval of mediated agreement:
 - Final agreed or stipulated judgment of court
 - Incorporate agreement by reference into final decree of court

- **B. Drafting Issues**

- Form of agreement
- Contents of agreement
- Enforceability
- Whether drafting of mediated agreement is the practice of law
 - Whether legal malpractice if draft faulty agreement or make mistake
- Whether mediation is the practice of law-issues of mediator certification, regulation and ethics
- Suggests mediator compose only a memorandum of agreement
 - Watch for parties expecting mediator review the agreement in terms of legal insufficiency

- **C. Enforceability**

- **Barnett v. Sea Land Service, Inc.** (vessel owner appealed from order which rendered judgment for longshoreman in his negligence action)
 - **Held:** Evidence of settlement that had allegedly been reached during mediation session was properly excluded
- **Rizk v. Millard** (petition filed for writ of mandamus to challenge an ordered entered striking relator's pleadings and granting default judgment against him in breach of contract action)
 - **Held:**
 - 1. Relator had right to revoke his consent to settlement agreement
 - 2. Trial court had no authority to impose discovery sanctions when relator repudiated unsigned settlement agreement forged in mediation
- **Colleen Bennett v. Lloyd Bennett** (judgment granting wife divorce-husband appealed)
 - **Held:** Wife could not be compelled to sign alleged mediated agreement
- **In the Matter of the Marriage of Ames** (husband sued for divorce and wife counter petitioned for divorce; parties ordered to mediation and reached community property settlement agreement, from which husband later tried to withdraw his consent; wife filed motion for entry of decree of divorce based on settlement agreement-court entered decree of divorce and husband appealed)
 - **Held:**
 - 1. Settlement agreement reached through mediation was binding and could not be repudiated
 - 2. Trial court should not have divided property differently from how it was divided in settlement agreement
 - 3. Husband entitled to new trial based on inconsistencies between settlement agreement and divorce decree
 - On rehearing - could not modify property division, since it had to strictly comply with terms of settlement agreement
- **Patel v. Ashco Enterprises, Inc.** (following breach of mediation agreement, employer filed suit to enforce agreement's terms against former employee-court enforced parties mediation agreement and employee appealed)
 - **Held:** mediation agreement was enforceable even though agreement was executed while litigation was pending in county

court and county court's jurisdiction to consider employer's noncompete claim was subject to challenge

- Silkey v. Investors Diversified Services, Inc. (investors sued securities brokerage and its registered representative for misrepresentation, violations of state securities law, breach of fiduciary duty, and constructive fraud; court ordered mediation resulted in oral settlement agreement, but investors later refused to sign written agreement, so defendants moved to enforce agreement; court granted motion and ordered reduction of agreement to writing-investors appealed)

▪ **Held:**

- 1. Oral agreement was enforceable
- 2. Court had power to order reduction to writing
- 3. Though it was possible that agreement would not be performed within one year, it was not within the Statute of Frauds

- Allen v. Leal (parents of shooting victim brought civil rights action against city and police officers; Ds filed counterclaim for breach of contract based on parents' alleged breach of mediated settlement; mediator accused of being coercive and bullying in obtaining a settlement)

▪ **Held:**

- 1. District could not exercise its supplemental jurisdiction over the breach of contract counterclaim
- 2. Coercion or bullying is not acceptable conduct for a mediator in order to secure a settlement

Chapter Thirteen - Closure and Follow-Up

- **Formal closure to mediation is important**

- Might be handshakes combined with exchange of executed agreement
- Might be more extensive particularly where there has been reconciliation between the parties
- To enhance likelihood of compliance with agreement
- Allow parties to complete closing remarks
- Mediator must be vigilant that parties may have real closure needs that attorneys may be completely unaware of
- Mediator should directly inquire about client's needs and implement a process which meets the parties needs
- Mediation process, if allowed to, can do more than deliver a monetary settlement-process can provide an avenue for conciliation and forgiveness and allow parties to leave with a sense of hope and peace
 - Provides avenue for real human expression
- Parties may have no desire for conciliation - cases that involve allegations of fraud or purposeful, intentional acts
 - Don't coerce parties to achieve closure if they have not desire for it-respect parties' desires

- **A. Concluding the Mediation**

- Understand time frame
- If don't achieve settlement, close the session
- **1. Closure With Formal Mediated Agreement**
 - Agreement is reached, writing and signing agreement is not

- necessarily the final part of the process
 - Continue to maintain neutrality-refrain from providing business cards or soliciting business from parties or attorneys
 - Post mediation private conversation may demonstrate a lack of neutrality and cause other party to question mediator's neutrality during the session
 - In closing, make sure:
 - Parties have exchanged any necessary information such as addresses and telephone numbers
 - Everyone has a copy of the agreement
 - Any follow-up between the parties or mediator is clear and specific
 - All dates, times and places are clarified and preferably in writing
- **2. Closure Without Formal Agreement**
 - Mediation often closes with formal agreement
 - If no agreement reached, mediator need not explain to parties in detail why mediation is being terminated-only explain that have reached an impasse and should do in positive manner
 - Where there is concern for safety of party-ensure that parties leave separately
 - Be careful in recommending reschedule of mediation-can something really be achieved by meeting again?
- **B. Post Mediation Follow-Up**
 - If terminates without agreement, mediators will often continue negotiations with both sides by telephone to achieve a settlement
 - Do not continually harass the parties in hopes that they will be motivated to settle
 - Reasonable, non-coercive follow-up by mediator is appreciated by parties and viewed as evidence of mediator's sincere commitment to the process
 - If one or both of parties need additional information or more time to retrieve date, the mediator should write a memorandum or agreement to reflect that need, along with the time and place of the next meeting
 - If reschedule, have specific objectives in mind
 - Additional information required
 - Additional time to think about offer or proposal
 - Always close session with goals and objectives for any follow-up meetings clearly understood by all participants

Chapter Fourteen - Ethical Considerations

- Ethics - discipline of dealing with what is good and bad and with moral duty and obligation
- Ethical - conforming to accepted professional standards of conduct
 - Or of or relating to moral action, conduct, motive or characteristics conforming to professional standards of conduct
- Confidentiality and neutrality are often considered ethical in nature
- Code of Ethics is necessity in the mediation practice

- Ethical guidelines also needed for others participating in the mediation (parties and attorneys)
- **A. Mediator Ethics**
 - o Mediation has not yet been formally established as a profession
 - Flexible process and flexibility is one of key benefits
 - Therefore, mediator ethics would also need to possess elasticity
 - Challenge - create guidelines that are sufficiently specific in directing mediator conduct yet simultaneously allow for some individual leeway
 - o **1. Historical Overview**
 - Mediation centers decided that a code of ethics (or at least a set of guidelines) was needed to provide some answers for the mediators
 - Fundamental differences in the roles of the advocate and the mediator prevent wholesale adoption by mediators of the lawyer's code of professional responsibility
 - o **2. Current Codes**
 - Mediator's duties may be determined by type of case, background of mediator, agency in which case is mediated, or place of referral (such as court)
 - Many codes are in existence-makes it difficult for mediator to determine exactly what code of ethics to follow
 - Fortunately, most code provisions are consistent
 - Practice issues included
 - Conflicts of interest
 - Mediator's role
 - Impartiality and confidentiality
 - Providing professional advice
 - Fees, advertising
 - Fairness of agreement
 - Qualifications, training and continuing education
 - Also include mediator's responsibility to the courts, self-determination of the parties, interests of outsiders and absent parties, separate caucuses and use of multiple procedures
 - o **3. Issues Surrounding the Use of a Code of Ethics**
 - Present challenges include:
 - Interdisciplinary nature of the field
 - Inherent flexibility of the process
 - Lack of an enforcement authority
 - Problems as basic as defining the process to be regulated
 - o **4. Areas for Ethical Consideration**
 - Findings of research indicate concerns with: confidentiality, conflicts of interest (how neutral the mediator must be), competency, preserving impartiality, informed consent, preserving self-determination, provision of counseling and legal advice and avoiding harm and abuse in the process
 - Issues when mediator is advocate for settlement-does she have interest in outcome
 - Issues if mediator provides advice or information-role could be viewed as an advocate-should really only advocate to obtain independent legal counsel
 - Fees should be reasonable and advertising truthful and misleading

- Prohibitions against contingency fees is common
- **5. Joint Code**
 - Latest efforts between American Arbitration Association (AAA) and the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR)
 - Proposed Model Standards of Conduct for Mediators
 - Purposes: promotion of integrity and impartiality in mediation, handling of conflicts and the appearance of conflict of interest, and the treatment of fees in mediation
 - Nine sections: Self-determination; Impartiality; Conflicts of Interest; Competence; Confidentiality; Quality of the Process; Advertisements and Solicitation; Fees; and Obligations to the Mediation Process
- **Poly Software International, Inc. v. Su** (software copyright dispute-both parties moved for disqualification of the other party's attorney)
 - **Held:**
 - 1. Defendant's attorney was not precluded from representing defendant on grounds of former representation of plaintiff
 - 2. Where mediator has received confidential information in course of mediation, that mediator should not thereafter represent anyone in connection with same or substantially factually related matter unless all parties to mediation proceeding consent after disclosure
 - 3. Plaintiff's attorney's previous role as mediator in dispute between software company and plaintiff and defendant, who were then partners in their own software venture, required disqualification of plaintiff's attorney and his law firm
- **McKenzie Construction v. St. Croix Storage Corporations** (court ordered mediation as unsuccessful and parties resumed preparation for trial-Ds filed motion to disqualify P's law firm, which hired mediator appointed to settle case)
 - **Held:**
 - 1. Attorney, who served as mediator in unsuccessful mediation prior to joining law firm representing party in identical action, was required to be disqualified from representing party
 - 2. Disqualification of attorney was imputed to other members of firm
 - 3. Affidavits of P's law firm regarding mediator's involvement in case after being hired by firm were not patently false, and thus, did not warrant imposition of sanctions
- **Fields-D'Arpino v. Restaurant Associates, Inc.** (employee brought claims of gender and pregnancy discrimination in violation of Title VII, NY Human Rights Law, and Title 8 of Administrative Code of City of NY-moved to disqualify employer's counsel of record)
 - **Held:**
 - 1. Disqualification of employer's counsel was warranted

- 2. Although firm did not conceal or misrepresent its relationship with employer, firm held itself out to employee as an impartial mediator for purposes of conducting meeting with employee and employer prior to employee's filing of claim with the Equal Employment Opportunity Commission (EEOC), during EEOC trial firm attempted to exploit what attorney-mediator learned during the mediation in order to rebut employee's charge of discrimination, and firm intended to use its attorney-mediator as a witness at trial with respect to the purpose and content of the mediation, which gave the appearance of impropriety
 - 3. Mediation is inherently an informal approach to dispute resolution that lacks the exacting procedural rules of the judicial process
- **B. Ethics for the Advocates and Parties**
 - Parties might be bound by certain ethical guidelines associated with their primary profession
 - Majority of cases, these are appropriate, however many of these were not determined with mediation practice in mind
 - Ex. obligation of attorney to represent his zealously means something very different in trial than it does in mediation
 - Ex. attorney advocate in mediation would be examined using lawyer's code as if her were participating in a more traditional negotiation
 - Concern: whether or not attorney has duty to inform a client about the mediation option-probably
- **C. Ethical Considerations for Referring Agencies or Entities**
 - Agency referring parties to mediation is usually the court
 - Consider ethical obligation of the judge in making an impartial mediator selection
 - Resulted in promulgation of standards which define specific role of the court
 - Hope that all states will adopt these standards
 - Also concerns about requirement for court to determine that a mediator to whom a case is referred is competent, that the case is properly referred to mediation, and that the court does not receive confidential information from the mediator
- **D. Ethics for Organizational Providers of Mediation Services**
 - Organization providers of mediation services include dispute resolution centers and statewide offices of dispute resolution
 - Generally non-profit entities
 - Also are fee-generating private providers
 - These organizations should also abide by ethical standards including impartiality and confidentiality
 - Also, should avoid conflicts of interests
 - Are draft guidelines for organizations including
 - Providing quality and competence of service, duty to provide information, obligation of fairness and impartiality, access for low-income parties, disclosures of conflicts of interest, inclusion of complaint and grievance mechanisms, responsibility of organizations to require its neutrals to adhere to code of ethics,

prohibition against false or misleading communication, provisions of confidentiality

Chapter Fifteen - Quality Control

- Qualifications provide guidance to those considering mediating as a career
 - o Would provide mediation profession with legitimation of the field, with preparation for continued, organized growth of the mediation practice and standardization of processes and procedures
 - o Is fear that such limiting qualifications will retard the growth of ADR use
- Most existing quality control techniques have been tried in community or court annexed programs:
 - o Initial selection of individuals
 - o Mediator training and education
 - o Testing and evaluation of mediator's competencies
 - o Regulation by certification or licensing procedure
 - o Standards of conduct
 - o Establishment of liability
- **A. Background**
 - o SPIDR established a Commission, which established three central principles:
 - No single entity (but rather a variety of organizations) should establish qualifications for neutrals
 - Greater the degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory the qualification requirements should be
 - Qualification criteria should be based on performance, rather than paper credentials
 - o Second Commission distinguished and defined terms of certification, licensure and regulation with precision, but failed to establish specific requirements
 - o Third Commission has been established - focus on reaching conclusions on precise and explicit qualifications
- **B. Qualifications**
 - o Educational backgrounds - most require an undergraduate degree and/or graduate degree
 - o Skills
 - o Training - some require
 - o General innate tendencies - personality, communication abilities and conflict management style
 - o Many worry that qualifications are subjective in nature and unfair if not applied consistently
- **C. Training and Education - Testing and Evaluation**
 - o Training programs range from 16-40 hours
 - Additional hours required in specialty areas such as family law
 - o Most educators use combination of lectures and role-playing
 - o Testing may include written examination or performance based testing
 - o Some require apprenticeship
 - o Other evaluation methods: settlement rates, user perceptions, opinions of

judges, attorneys and peers

- Even if don't receive letters or certificates of completion, may still mediate
 - Only Minnesota requires mediators to disclose their qualifications prior to mediation

- **D. Regulations, Certification, and Licensure**

- Still attempting to determine who the certifying or regulatory authority should be
- Receive receipt of a certificate that provides specific number of hours of training received-however, no bearing on individual's competency as a mediator
- In 1992, Supreme Court of Florida was first organization to enact comprehensive guidelines for mediator certification and decertification
 - Parts include mediator qualifications, standards of professional conduct, discipline, complaint committee process and sanctions

- **E. Standards of Conduct**

- Address mediator's activities in a practical sense
- Provide guidance to mediators regarding skill and practice actions as opposed to ethics (moral or right and wrong issues)
- One problem with standards is that there are many stylistic differences in mediators
- Styles:
 - Labor mediation - uses separate meetings to explore minimum settlement positions
 - Therapeutic mediation - usually conducted by one with specific training in the psychotherapeutic or mental health field
 - Legal mediation - focus is on the dispute and by legally trained mediator (focus only on legal solutions as possible outcomes and mediator provide legal analysis)
 - Supervisory mediation - mediator has some inherent authority and may use to decide for parties if don't arrive at own settlement
 - Muscle mediation - mediator strongly urges or coerces parties into accepting a settlement
 - Scrivener mediation - mediator reports thoughts and ideas expressed by others-passive style and relies on abilities of parties to resolve own conflicts
 - Structured mediation - most rigid style used primarily in divorce cases where mediation takes place over period of time
 - Shuttle mediation - separate caucus sessions that are connected by shuttling mediator
 - Crisis mediation - formal mediation used when parties are in the process of disputing
 - Co-mediation - use of two mediators simultaneously-useful where the conflicts are multi-dimensional and require expertise of various types
 - Important that co-mediators do not compete with one another, consult with each other before making important decisions, maintain a unified focus, support each other, and remain flexible
 - Trashing - tearing apart the case and then mediator assists in building the case back with a more realistic settlement figure on the table - resembles a case evaluation

- Bashing - focus on actual settlement offers and bash away at them until the parties agree to a figure somewhere between the two originally proposed
- Hashing it out - direct communication between the disputing parties encouraged and focus on interests and issues of the parties
- **F. Mediator Liability**
 - **1. Causes of Action**
 - General negligence
 - DTPA
 - Breach of contract
 - Fraud
 - False imprisonment
 - Libel or slander
 - Breach of fiduciary duty
 - Tortious interference with a business relationship
 - Be cautious in advertising and guard against making promises or guarantees
 - Provide all information to parties in writing and design a method to verify what information was received by the parties
 - When not sure, better safe than sorry is the advice
 - **2. Damages**
 - Must be proven
 - Harder to prove if issue concerning mediation process itself
 - Easier to prove if damages involved events which occurred outside mediation
- **G. Immunity**
 - **1. Policy Considerations**
 - Mediator could be considered an extension of the court or judge and provide immunity
 - Many argue that at least volunteers should receive immunity-or they will fear having to expend time and money in defense of malpractice claims
 - Also could argue that many professionals who are also mediators are not provided immunity in their regular profession
 - **2. Statutory Provisions**
 - 19 states provide immunity for mediators including Texas
 - Usually limited to liability of mediators for willful or wanton misconduct
 - **3. Case law**
 - Howard v. Drapkin (mother brought action against psychologist who was hired by both parents to evaluate child's allegations that father had sexually abused, for purposes of custody dispute, alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud)
 - **Held:**
 - 1. Psychologist was entitled to common-law immunity as quasi-judicial officer participating in judicial process
 - 2. Psychologist was entitled to statutory privilege for publication in judicial proceeding

- **Wagshal v. Foster** (court appointed arbitration; Wagshal objected to first evaluator based on alleged conflict of interest-new evaluator appointed, D, and against an objection was made based on neutrality and perceived conflict of interest; claim that Wagshal's attitude represented principal impediment to success of the process; third evaluator appointed and case settled)
 - **Held:** D has judicial immunity as court appointed mediator and case against him dismissed
- **H. Quality Mediation Does Not Exist**
 - Critics argue that the traditional legal system has more safeguards for the individual and for society than the mediation process
 - Argue gender discrimination and racial or ethnic prejudices are more likely in mediation

Chapter Sixteen - Specialized Applications of Mediation

- **A. Agricultural Disputes**
 - Between farmers and lenders mainly to provide protection from immediate home loss for the farmer in a foreclosure
 - Required by Agricultural Credit Act of 1997 - requires farmer to be provided legal information and financial advice prior to mediation (this is provided by organization that administers the program)
- **B. Schools and Universities**
 - Student disputes-use student-peers
 - Elementary level to high schools and colleges
 - Administrative concerns
 - Conflicts between administrative departments
 - Conflicts with parents or other interested parties
 - Claims against schools and universities
- **C. Religious Institutions**
 - Construction disputes
 - Inclusion or recognition of gay members
 - Content and efficacy of a religious school program
 - Sexual harassment and indecency with children claims against priests, ministers and rabbis
 - Medical malpractice claims involving church owned hospitals
- **D. Divorce and Family**
 - Divorce
 - Child custody matter
 - Termination of parental rights
 - Establishment of adoption
 - Different because number of issues, many emotions involved and extends over a long period of time
 - Co-mediation is common-lawyer and therapist (sometimes an accountant)
- **E. Employment and Labor**
 - Union or collective bargaining matters
 - Mediator meets with representatives from each group and then is very active in formulating solutions with each representative negotiator

- Many employment agreements provide for mediation of all disputes as a condition of employment
 - Use for wrongful termination claims, age and sexual discrimination claims, claims under Americans with Disabilities Act, sexual harassment disputes, whistle blower claims and disputes involving retaliation for filing workers compensation claims
 - Must consider affect on continued employment
- **F. Public Policy Matters**
 - **1. Generally**
 - Generally within government as well as specific environmental concerns
 - Federal, state and local governments
 - Not private matters if affect great number of individuals
 - Conflicts of whether duty to inform public of decisions made during negotiations
 - **2. Environmental Issues**
 - Effect all individuals-issue are complex and based in large part upon scientific principles
 - Mediators depend on expertise and assistance of engineers
 - Keep in mind that can be very emotional for members of public who are affected-they should have opportunity to participate in mediation
 - Therefore, these are usually lengthy mediations
 - **3. The Federal Sector**
 - Civil Justice Reform Act of 1990 - required each district court to design a cost and delay reduction plan-legislation encourage use of ADR in plan
 - Alternative Dispute Resolution Act of 1998 - mandates that each federal district court establish an ADR program
 - Negotiated Rule-making Act of 1990 specifically urges federal agencies to utilize the reg-neg process in their rule making
 - Determination of:
 - Affected parties
 - Feasibility of process use
 - Notice and meeting
 - **4. State and Local Governments**
 - Encourage same practices as Congress
 - Many states have statewide offices of dispute resolution
- **G. Gay and Lesbian Matters**
 - Mediation processes developed specifically for these issues
 - Primary focus is dissolution of relationship
 - Disputes with individuals who are HIV positive
 - Resources limited, speedy resolution important and often need or desire confidentiality
- **H. Health Care Issues**
 - Disputes over provisions of treatment, cost and payment, and allegations of medical negligence or malpractice
 - Disputes in hospitals - intra-organizational (general employment grievances to matters of physician privileges)
 - Assist in life and death decision making with elderly

- **I. Internet and Cyberspace**
 - o Can use internet to advertise mediation
 - o More common now to conduct actual mediation in chat rooms
 - Speed and convenience are primary benefits
 - Issues of lack of interpersonal dynamics and confidentiality
- **J. Disputes Involving Attorneys**
 - o Mediation of lawyer-client disputes
 - Many disputes result from lack of communication-mediation provides better communication to resolve disputes
 - o Law firm dissolution
- **K. Criminal Arena**
 - o Can mediate prior to prosecution (allegations of criminal activity only)
 - o Some jurisdictions have trained police officers to mediate on the spot when called to a domestic or neighborhood disturbance
 - o Can mediate a plea bargain
 - o Victim-offender mediation focuses on negotiating terms of restitution to be provided to victim by the offender
- **L. Transactional Matters**
 - o Putting together deal, sale or a contract
 - o Negotiation of partnership documents or formation of a corporate entity, a neutral third party mediator can provide structure to the negotiations
- **M. Sports Teams**
 - o Disputes arise between players and between players and coaches
 - o If disputes not dealt with effectively, may adversely affect team morale and performance on the field
 - o Disputes occur when players competing for same position, off-field social disputes, racial divisions or economic lines, and personality disputes
- **N. International and Cross-Cultural Considerations**
 - o Disputes between different nations-must include environmental and economic matters
 - o If security or political issues-usually conducted by outside nation
 - o Cross-cultural mediation - between individuals of different cultures

Chapter Seventeen - Preventative and Creative Uses of Mediation: Derivative, Combined and Hybrid Processes

- **A. Derivative Processes**
 - o **1. Conciliation**
 - Usually used interchangeably with mediation
 - Some say primary difference resides in the role of the neutral
 - Conciliation - neutrality merely brings parties together to discuss matters
 - Mediation - mediator has much more active role
 - Reconciliation between parties is often an integral part of the process
 - o **2. Consensus Building**
 - Similar to mediation - focus on assisting parties in a dispute in reaching a voluntary, mutual, and satisfying agreement
 - Often are many different groups with a variety of interests

- Coalitions form
 - Much intra-group negotiation takes place away from the table
- Used in large public policy disputes
- Not a one time intervention
 - Meets to choose process and then choose protocols
 - Packaging stage - convenor meets in private sessions to determine partial solutions
 - If reach agreement, write up agreement and assist in binding entire group
 - Ratification - meeting participants go back to constituencies and sell agreement so that group's sign off can be obtained
- 3. Reg-Neg
 - Regulatory negotiation
 - Attempt to shorten rulemaking process for federal (as well as state) agencies
 - All interested or affected parties are contacted and invited to take part in the initial design of the rule
 - Discussion continue until all reach consensus about the content of the rule or regulation
 - Third party neutral is called convenor and is responsible for each step in the process
- 4. Convening Conferences
 - Purpose is to select ADR process which will best assist in resolving a given dispute
- B. Combined Processes
 - Med-arb - parties first engage in mediation; if agreement not reached in pre-determined amount of time, the parties enter arbitration
- C. Hybrids
 - Merger of two process-composite
 - Mediation with evaluative process results in mini-trial
 - Use mediation concepts to facilitate communication
 - Then neutral may share her evaluation followed by facilitated discussions
- D. Design Issues
 - Dispute systems design
 - Many organizations try to design, in advance, efficient ways of handling disputes
 - Often mediation is included
 - Dispute resolution has six components:
 - Assessment of current system for dispute resolution
 - Determination of specific goals and objectives of new system
 - Design for the new system
 - Education of users about the new system
 - Actual implementation of new system
 - Evaluation
- E. Conclusion
 - "A mind, once stretched by a new idea, never regains its original shape."
 - Through the mediation process, it is hoped that the minds of mediators, lawyers and disputants are stretched
 - Those involved in mediation process have a unique opportunity to fashion

Chapter One - Overview of the ADR Universe

- A. Introduction

- Most professionals not educated in skills required for constructive resolution of conflict
- Alternative Dispute Resolution (ADR) resulted from frustrations of trying to use the justice system for dispute resolution
- ADR does not ignore fact that disputes exist-it focuses on new and creative methods to resolve disputes-involves examining the underlying conflicts (identifying and resolving)

- B. What Are Disputes?

- Conflict - Latin (*con*-together and *fligere*-to strike)
- Conflict - encounter with arms, a fight, a battle, a prolonged struggle
 - Mental or spiritual struggle within a person
 - Clashing or variance of opposed principles, statements or arguments
- Variables:
 - Many forms - looks to pistol shot
 - Intensity varies
 - What conflict affects
- Communication process is integral-verbal and nonverbal
- Conflict not always negative-can be positive
 - Closer examination of issue
 - Assessment of situations
 - New and creative resolutions
 - Establish and strengthen relationships
 - Root of personal and social change

- C. Traditional Means of Resolving Disputes

- Fight, force, coercion
 - If ignore the conflict-it doesn't get resolved
- Accommodation-but leads to ceding to other's demands and not meeting your needs-leads to later frustration
- Voluntarily relinquish responsibility for the conflict-leave to chance (third party with no interest)
- Determining rights and making power plays-collaboration
- Look at parties interests:
 - Reconcile underlying interests
 - Determine who is right
 - Conclude who is more powerful

- D. The Variety of ADR Devices

- ADR - identifies group of processes through which disputes, conflicts, and cases are resolved outside of formal litigation procedures
 - Adjunct to legal system
- Basis of ADR-negotiation process
- ADR - involves third party neutral who assists parties in reaching a resolution to a dispute
- 1. **Adjudicative** - neutral adjudicates or makes a decision (most similar to formal court proceedings)
 - a. **Arbitration**

negotiations

- **b. Lay Evaluation - The Summary Jury Trial**
 - Trial in summary fashion-gives litigants their day in court
 - Attorneys present abbreviated version of evidence to advisory jury selected from regular jury pool
 - Testimony is usually one witness per side
 - May be binding-depends on parties' agreement
- **c. Judicial Evaluation**
 - Knowledge, experience and temperament brought to case by retired judge-helpful in assisting the parties reach a settlement
 - Judge merely points out to lawyers and litigants the strengths and weaknesses of the case
- **d. Specialist or Expert Evaluation**
 - If case turns on technical issue beyond understanding of court, lawyers and jury
 - Provide independent expert evaluation
 - Areas such as construction, computer design, securities, biomedical technology
 - If all parties agree to neutral expert-generally accepted as definitive
 - Can also be included as part of mediation
- **3. Facilitative** - neutral does not render a decision or evaluation; natural provides assistance to parties so that they may reach an acceptable agreement
 - **Mediation** - third party neutral acts as facilitator to assist in resolving a dispute between one or more parties
 - Least adversarial and encourages parties to communicate directly
 - Mediator - helps identify real issues of dispute and interests of the parties and generating options for settlement
 - Goal: parties themselves arrive at a mutually acceptable resolution of the dispute
 - Flexible
 - Valuable when parties want to maintain the relationship
 - **Conciliation** - over the telephone
 - Disputing parties have been reconciled and the relationship has been mended
 - **Consensus building** - extended mediation involving large groups and a number of conflicts
 - Make take place over a period of time
- **4. Combined Processes and Hybrids**
 - Use ADR process in conjunction
 - Most common - Med-Arb (arbitration and mediation processes)
 - **Mini-Trial** - negotiation, mediation and case evaluation
 - Parties want continued business dealings
 - **Jury determined settlement** - jury summary trial and arbitration
 - Proceeds similar to summary jury trial, but jury provides a binding settlement
- **E. Use of ADR**
 - No bad choices - but need to decide which process, or combination, to use
 - To choose:

- Conducted by sole arbitrator or panel of three
- Arbitrators listen to adversarial presentation of all sides and render decision (award) - by attorneys or parties
- Some rules may govern process
 - Can submit evidence and use witnesses and experts
- Arbitrators take no more than 30 days to deliberate and render decision
 - Decisions are generally binding where parties have previously contracted for arbitration
- Very limited statutorily defined rights of appeal
- Mandatory court arbitration - advisory nature
- Other variables:
 - Determination of rules of procedure to follow
 - When in dispute arbitration appropriate
 - Amount of discovery
 - Arbitrator explain award or naked award
 - Arbitrator make findings of fact and conclusions of law
 - Contract to expand appealability
 - Background of arbitrators
- **b. Private Judging**
 - Parties have retired or former judge hear the case and render a decision
 - Court order or parties agree to do
 - Can decide all issues or just a portion of the case
 - Resembles traditional litigation-different in terms of expertise of judge, speed of decision and flexibility in procedure rules
 - Use witnesses and documents
 - Record of trial is made
 - Decision entered referring court as judgment of the court-same rights as if judgment rendering by referring court
- **c. Fact-Finding**
 - Neutral third party, after gathering information from all parties, makes a determination of the facts
 - May be finding or advisory
 - Portion of matter or final resolution
- **2. Evaluative** - providing lawyers and litigants with feedback as to merits of the case; process whereby advocates present their version of the case to one or more third party neutrals, who evaluate the strengths and weaknesses of the cases
 - **a. Peer Evaluation**
 - Texas-Moderated Settlement Conference
 - Panel of three neutral, experienced attorneys who listen to factual and legal presentations by parties' counsel
 - Panel then questions attorneys and their clients
 - Renders advisory, confidential evaluation of strengths and weaknesses of the case and provides a range for settlement
 - Not binding-but should assist in further settlement

- Look at from perspective of parties
 - Then look at from public-interest perspective
- Evaluate client's goals and which process likely to achieve those goals
 - Then look at what are the impediments to settlement and what process is most likely to overcome those impediment
- Tables suggest the values of each procedure in meeting clients objectives (page 18 and 19)
- Lawyers must consider not only what the client wants but also why the parties have been unable to settle their dispute and then must find a dispute resolution procedure
- Rule of Presumptive Mediation:
 - Mediation has greatest likelihood of overcoming all impediments except different views of facts and the law
 - First attempt customary mediation techniques-if not successful, mediation can make an informed recommendation for a different procedure
 - Presumption overcome if either party has strong interest in receiving a neutral opinion, obtaining precedent or being vindicated, and is unwilling to consider any procedure that forecloses the possibility of accomplishing that objective
- ADR - permanent part of justice system
 - More lawyers are using these processes to their benefit (not looking at them as a threat)

Chapter Two - The Mediation Process

- **A. Overview**
 - Purpose: assist people in reaching a voluntary resolution of a dispute or conflict
 - Not rigid, but fluid in nature
 - Deals with human behavior and motivation-must also be adaptable to individual differences
- **B. Historical Perspective**
 - **1. International Sphere**
 - China and Japan-first choice (not alternative) for dispute resolution
 - Focused on conciliatory approach to conflict (morals rather than coercion)
 - **2. United States**
 - Distinct roots:
 - Community justice
 - Solve disputes in labor arena
 - Native Americans-continue to use peace making (dealing with underlying causes of conflict and mend relationships)
 - **3. Current "Movement"**
 - AAA - American Arbitration Association
 - Set up pilot mediation projects-attempt to ease social tensions
 - Law Enforcement Assistance Administration - set up mediation program for citizen's disputes

- Pound Conference-movement was actually born
 - Attendees (judges, court administrators, legal scholars) wanted to look at exactly why people were so dissatisfied with the way justice was administered in the United States
 - Follow up task force established
 - Pilot project at Neighborhood Justice Centers (NJC) resulted in high satisfaction by parties of use of mediation to resolve minor disputes
 - Today, there are over 400 centers
 - Lead to ADR use in justice system
 - Judges realized that by referring a matter to dispute resolution process early, a settlement could occur more expeditiously-with generally more satisfied participants
 - Today, ADR is integral part of pre-trial procedure in many state and federal courts
- C. Dissection of the Mediation Process
- *Mediation is an art, not a science*
 - 1. Generally: Traditional Models
 - Preliminary Arrangements-DON'T OVERLOOK THIS STEP
 - Prior to beginning actual mediation session
 - Referral
 - Select mediator
 - Determine who should attend
 - Issues of fees
 - Settlement authority
 - Timing
 - Court orders
 - Gain information from parties
 - Disseminate information about mediator and mediation process to parties
 - Select location
 - Arrangement of furniture
 - Mediator's Introduction
 - Mediator introduces herself and parties/representatives
 - Describes the process and sets ground rules
 - SETS THE STAGE
 - Opening Statements by Parties
 - Uninterrupted presentation of their views
 - Fully express in own words how they view the dispute
 - *Ventilation-Optional*
 - *Important to allow individuals to vent*
 - Information Gathering
 - Mediator asks questions based on opening statements to obtain necessary additional information
 - Ask open-ended questions
 - Issue & Interest Identification
 - Mediator identify issues
 - *Agenda Setting-Optional*

- *If complex case, made need to determine order to deal with issues*
 - *Caucus-Optional*
 - *May meet privately with each party for option generation*
 - Option Generation
 - Move parties to generating ideas, options or alternatives that might resolve the case
 - *Reality Testing-Optional*
 - *Check with each side realistic possibility of attaining what hoped for*
 - Bargaining and Negotiation
 - Give and take assisted by mediator
 - Agreement
 - If agreement, mediator restates
 - Draft complete agreement or memorandum of settlement
 - If no agreement, mediator state where parties are, and note any progress made in the process
 - Closure
 - **2. Recent Adaptations and Modifications**
 - Family law disputes and public policy matters-use multi-session approach
- **D. The Role of a Mediator**
 - Facilitator
 - Conductor of the negotiation
 - Role changes through process
 - Supervise (or parent) the parties
 - Teacher-assisting parties in learning the subject matter of their dispute, but also in teaching the process
 - Advocate (not for the parties) for process and settlement
 - Catalyst-moving the parties in direction of resolution
 - Orchestrators
 - Deal makers
 - Translations of comments and proposals
 - Concern: amount of influence mediator should have on the outcome of the case
 - Safeguard, maintain and control of the process
 - Parties control content matter of the dispute
 - *Parties are responsible for the content; mediator is responsible for the process*

Chapter Three - Mediator Skills

- **Wide variety of skills required including:**
 - Patience of Job
 - Sincerity and bulldog characteristics of the English
 - Wit of the Irish
 - Physical endurance of the marathon runner

- Important to be sensitive to feelings of others as well as yourself
- Demonstration of empathetic understanding is appropriate, but must remain objective and neutral
- **D. Human Behavior and Motivation: The Mediator's Role**
 - Much of mediator's work will involve motivating human behavior
 - Group dynamics
 - Figure out whether constructive or destructive with regard to resolving the matter
 - If destructive, try to influence group behavior and effect change in patterns of conduct
 - Try to recognize what elements can and cannot be changed

Chapter Four - Getting to the Mediation Table

- **A. General Appropriateness**
 - Mediation saves time and money
 - Specific factors that indicate case or matter is appropriate for mediation include:
 - Ongoing relationship that parties wish to maintain
 - Parties hope to establish ongoing relationship through mediation
 - Parties prefer to avoid a legal precedent
 - Parties have need for assurance of confidentiality about the nature of the dispute, the agreement or both
 - Exists a need for assistance in communication and information exchange
 - Parties demonstrate an inability to identify common interests
 - Parties and/or their advocates need assistance with the negotiation
 - Need for creativity in resolution
 - Parties express desire for self-determination
 - One or both parties (or their counsel) has made an unrealistic assessment of the case
 - Despite differences, there is a mutual superordinate goal of a mutually satisfactory resolution
 - Mediation appropriate in almost every case at least as a first step
 - Mediation may be inappropriate in following cases:
 - Client cannot effectively represent her best interest and is not represented by counsel
 - Client seeks to establish legal precedent
 - Significant person is unable to be present
 - Party is entitled by statute to attorney's fees (although mediation is still an alternative)
 - Strong business competition between the parties in concentrated markets
 - Threat of criminal action
 - One party wants to delay a resolution
 - Likelihood of bankruptcy
 - Discovery is needed (mediation could be postponed until after sufficient discovery)
 - Enforcement of the outcome will be necessary
 - Long distance or telephonic mediation is discouraged

- B. The Referral Process

o 1. Non-Legalized Matters

- Those disputes or conflicts which have not accessed the legal system
- a. Voluntary
 - Dispute resolution centers
 - Smaller cases - amount in controversy not great
 - Referrals via citizen complaint centers
 - Individuals not represented by counsel and usually not understand mediation process
- b. Contractual
 - Parties less hesitant about process
 - Include in the clause: matters which may be subject to disagreement at time dispute arises (includes time, place, and cost of mediation, identification of mediator and who will attend mediation)
- Devalk Lincoln Mercury, Inc. v. Ford Motor Co. (dealer and owner/manager sue manufacturer for termination of dealership; dealer's compliance with dispute resolution provisions did not excuse its failure to present the claim to the dealer policy board as condition precedent to filing a lawsuit)
- Weekley Homes, Inc. v. Jennings (agreement provided "Mediation of the disputes is an express condition precedent to arbitration of the disputes"; purchasers of home sued builder; builder tried to compel arbitration first-failed because did not fulfill condition)

o 2. Pending Cases: Public or Private Sector Mediation

▪ a. Mandatory Referral

- Initial issue: whether an individual in a dispute or with a claim can be compelled to go to mediation (whether courts have inherent authority to mandate referral particularly over objection of one of litigants)
- Keene v. Gardner (court did not have the power to require mediation and sanctions with following the 10 day objection period required by statute)
- Carmichael v. Workers' Compensation court of the State of Montana (injury occurred prior to new legislation requiring nonbonding mediation before a party may file a petition in the Worker's Compensation Court; this statute unconstitutionally impairs a contractual obligation)
- Participation that may be required:
 - o Good faith
 - o Exchange of position papers and other information
 - o Minimal meaningful participation
 - o Attendance with settlement authority
 - o Obligation to pay mediator's fee
- In Re: United States of America, Petitioner (United States was required to be represented at mediation by person with full settlement authority-not abuse of district court's discretion)
- Graham v. Baker (party attended mediation and participated to extent of stating that his position was not

negotiable; statute does not give mediation service power to compel either creditor or debtor to negotiate; this presence satisfied the minimal participation required by statute)

- Decker v. Lindsay (judge ordered personal injury suit to mediation-litigants could be compelled to participate despite objections, but litigants could not be forced to make good-faith efforts to settle case during mediation)
- Texas Department of Transportation v. Pirtle (motorist action for injuries sustained in one car accident; TDT won, but was required to pay mediation costs because failed to mediate in good faith-valid assessment of costs)
- Texas Parks and Wildlife Department v. Davis (park visitor sued for injuries sustained when concrete bench collapsed under him; visitor won and sanctions against the Department for failure to negotiate in good faith during court ordered mediation were not warranted)
- Larry R. Obermoller v. Federal Land Bank of Saint Paul (denial of debtor's application for temporary injunction to halt foreclosure sale of farm; farmer-lender mediation act does not impose a penalty when creditor fails to serve a mediation notice)
- What is good faith?
 - Does not mean reaching agreement
 - Does not obligate parties to possess a sincere desire to resolve the matter
 - Does not mean not having to disclose to the other participants or even the mediator everything about your case
 - Being nice is also not element of good faith
 - Suggested factors that might be included in rule compelling good faith:
 - Arriving at mediation prepared with knowledge of the case (facts and possible solutions)
 - Taking into account interests of other parties
 - Having all necessary decision-makers present at the mediation, not via a telephone
 - Engaging in open and frank discussion about the case or matter in a way that might set out one's position for the other to better know and understand
 - Not lying when asked specific and direct question
 - Not misleading the other side
 - Demonstrating a willingness to listen and attempting to understand the position and interests of other parties
 - Being prepared not only to discuss the issues and interests of client, but also to listen to issues and interests of all other participants
 - Having a willingness to discuss your position in detail

- Explaining the rationale why a specific proposal is all that will be offered, or why one is refused
 - **b. Cost Considerations**
 - Payment to mediator-one concern is neutrality
 - Be careful not to let it affect neutrality
 - Penalties or sanctions for non-compliance with mediation order are possible
 - **c. Voluntary Participation**
 - Difficulties may arise when one party advocates mediation for a wrong reason, such as a disguised opportunity for unstructured discovery
- **C. Issues of Timing: The Life of a Dispute**
 - **1. Non-Litigation Matters**
 - Sooner resolved, more positive impact on relationship
 - Unless hostility where discussion would likely lead to physical confrontation
 - **2. Legal Disputes**
 - Longer wait for mediation-more likely parties' will become entrenched in their positions and unmovable
- **D. The Role of the Attorney - Advocate in the Referral Process**
 - Some states strongly recommend that attorneys inform clients of ADR options
 - Some states may require ADR prior to setting case for trial
 - Attorney-counselor should discuss all possible options with client
- **E. Selection of the Mediator**
 - Parties more satisfied if they choose mediator rather than the court
 - **1. Matching Cases and Mediators-consider**
 - Case characteristics with mediator characteristics
 - Costs
 - Technical expertise required
 - Previous legal experience
 - Personality type
 - Mediator must be able to control situation but also be able to be quiet when appropriate
 - Medeiros v. Hawaii County Planning Commission (not essential to due process that appellants participate in naming the mediator; appellant's due process rights are protected so long as the selection process and chosen mediator are unbiased; appellants do not claim the mediators were biased or prejudiced and do not claim to have been prejudiced by the Commission's selection)
 - **2. Finding Mediators**
 - Established ADR provider list
 - Yellow pages

Chapter Five - Preparation for the Meditation

- **A. The Mediator**
 - Preparatory stage varies from a few minutes to several months depending upon nature of dispute and method of referral

- Often fast track preparation in community-based programs
- Can prepare in global way - be ready to listen carefully, analyze the case, remain neutral and provide environment for creative problem solving
- If private practice, can dictate nature of preparation - begin by asking three questions:
 - 1. What do you, as the mediator, want the participants to know prior to sitting down at the mediation table?
 - 2. What do you want to know about the case and the participants prior to beginning the mediation session?
 - 3. How the information exchange will be accomplished?
- **Preparation is mechanical and mental:**
 - **Mechanical** - logistics, housekeeping and administrative details
 - Neutral location
 - Room décor
 - Way room is arranged (seating arrangements)
 - Access to telephones
 - Food and beverages
 - Time allotted
 - If cancellation or postponement
 - Can have non-refundable deposit or cancellation fee
 - However choose to handle, address issue at time mediation is arranged
 - Determine mediation fee in advance
 - Pre-mediation correspondence
 - Provide information about mediation process and mediation, herself
 - Two views:
 - Less the parties know about what will happen, the better
 - More the parties know about the process in advance, the better
 - Most mediations fall between these two extremes
 - Typical packet of information includes:
 - Outline
 - Letter of administrative details
 - Other items participants should review
 - Disclosure of possible conflicts
 - Agreement or contract to mediate
 - Forms disclaiming mediator representation
 - Waiver of potential mediator liability
 - Confidentiality agreements
 - Evaluation forms
 - May ask for written overview of the case from the parties
 - Need to encourage participants to be prepared as well as help assist mediator to be prepared
 - Assure that everyone is necessary for a binding decision is present at the mediation table

- Parties must be ready to listen
- Decision maker in mediation is not the neutral party-persuasion or advocacy, if it takes place, should take place across the table

Chapter Six - Beginning the Mediation

- **A. The Mediator's Introduction**
 - Establishes tone and tenor of mediation
 - Vehicle to build trust with participants
 - Assume mediation will be new experience for participants
 - Should closely resemble a conversation
 - Set stage by exhibiting enthusiastic, positive and encouraging attitude
 - **1. Purpose**
 - To inform the participants about what is going to happen
 - Time for parties to relax and feel more at ease with surroundings, mediator and process
 - Let participants know that mediator is in control of mediation process
 - Mediator establishes his credibility and demonstrates knowledge of the process
 - Set any ground rules
 - **2. Content**
 - Introduction of all parties sitting around table and introduction of mediator
 - Confirm parties have adequate authority to settle the matter
 - Discuss any potential conflicts
 - Ensure everyone is in agreement to participate
 - Any documents should be finalized
 - Discuss benefits of mediation process
 - Discussion of mediator's role in the process
 - Brief procedural outline of the process
 - Specific ground rules explained
 - Against interruptions
 - Suggested time limits
 - Excepted time commitments
 - Rules governing confidentiality
 - Explain caucus process and confidential provisions
 - Request of commitment by participants to a good faith effort at settlement
 - Take care of housekeeping details
 - Possibly summarize mediator's understanding of the case (unless time constrained)
- **B. Opening Statements**
 - Remember not to bring any presumptions about the case based on information previously received
 - Offers all participants the opportunity to take part in information gathering process
 - If pending lawsuit-plaintiff should start (unless D's counterclaim is primary focus of mediation)

- Important to have clients participate and make known that the case belongs to the clients and not the lawyers
 - Decision making - should be left to clients
 - Attorney roles vary - include:
 - Non-participant
 - Silent advisor
 - Co-participant
 - Dominant or sole-participant
 - Some states have statute that allow the mediator to exclude the lawyer from the mediation
- Avoid ex-parte telephone calls with any participant-use conference call format
 - This will assure actual, as well as perceived neutrality of the mediator

▪ **Mental**

- Not necessary to know and memorize in advance each factor or legal argument that parties might propose at mediation
- If lawsuit pending, mediator should know the status of the case as well as status of any pending motions or deadlines
- Any resolution reached at mediation should not conflict with any court order
- Try to avoid making any prejudgments about the case
 - Rid self of all preconceptions of opinion and adopt a non-judgmental state of mind
- Prepare to be patient
 - Prepare to not allow a desire for a faster pace to impact the disputants full ability to express their feelings or describe the dispute
- Get ready to focus completely on the dispute and be able to avoid any other distractions or commitments
- Commit to actively listen to comments of all participants
- Pledge to search for underlying interests
- Don't begin process overly optimistic or pessimistic

- **B. The Parties and Their Representatives**

- Before mediation, each side should gather its representatives, decision makers and legal counsel for strategic planning session
- If public policy involved, meeting of all constituents should take place prior to mediation
- Clarify goals and objectives and discuss how plan to achieve them in mediation
- Mediation should be future oriented-focus on how the matter will be resolved
- Consider use of documentation such as charts, graphs or video tapes in advance
- Participants should be encourage to engage in preliminary discussion of options
- Remind parties to maintain an open mind
- Encourage consideration of goals, objectives and interests of other side while preparing for mediation

- Party's decision is strongly influenced by the mediator's presentation of selected information to each party to close the deal
 - Mediator highlights the risks over any other kind of information
 - **Information or assisted autonomy**
 - Mediator acts as information conduit
 - Party's have means to exercise control after receiving technical expertise
 - Mediator assists parties in exploring individual values
 - **Deliberative or reflective autonomy**
 - Mediator provides parties with same factual and legal information described in the informative model, but also helps the parties understand, articulate and choose the values that should govern their ultimate choices
 - Mediation process is not concerned with achieving conformity to broader societal norms, but rather to creating individual norms for the parties themselves
 - **Questions**-remains personal choice for mediators:
 - Each individual has certain values-should a mediator be concerned with whether the results are fair?
 - If one party clearly more knowledgeable, should the mediator intervene and provide the requisite knowledge to the other party?
 - Community of numbers-does the mediator have any duty in these instances to compensate by limiting the amount of time for discussion to equalize the real or perceived imbalance?
- **B. Debating the Duty of the Mediator**
 - Fundamental questions about court mediation concern fairness
 - Presumably, parties represented by lawyers would have relevant legal knowledge, but most un-represented parties are at the short end of the stick
 - Variance over mediators role-between:
 - Disinterested referee and
 - Empowered specialist
 - Debate-should mediators guarantee fair agreements
 - Also, what types of legal assistance can the mediator provide/offer?
 - Legal information
 - Some are simple questions that could be answered by county clerk
 - Other questions require legal counsel
 - Any other questions have no clear answers
 - Large policy questions remain
 - Informational
 - Relating to specific areas of the law
 - Also ask for ultimate issues and probable court outcomes
 - Questions related to strategy and tactics
 - **Bottom line:** mediator must maintain neutrality and impartiality in:
 - Balance and conduct of the negotiations which she facilitates (i.e., the process)
 - Ultimate result or outcome of the mediation

- Timing and method of presentation vary
 - Determine specifics in advance of session, if possible
- Use of charts, graphs or drawings for explanations - encouraged during follow-up stage instead of opening unless visual aids essential to the opening
- **C. Follow-Up Information Gathering**
 - Issues usually not all identified in opening statements, therefore don't move directly into option generation
 - Because once start generating options, parties have a tendency to not want to share any more information
 - **1. Effective Questioning by the Mediator**
 - Mediator's role is to continue to gather information not only for own behalf, but for behalf of other parties
 - Ask at least three open-ended questions
 - **a. Open-Ended Questions** - allow for the broadest possible answer (can be focused or more focused)
 - What do you think?
 - Tell me more about...
 - Could you explain...
 - Please explain further about...
 - How did you feel when...
 - What happened?
 - Is there anything else that you believe is pertinent to...
 - **b. Open-Focused Questions** - focused questions consist of requests for information similar to general open question, but is more directive
 - How did you feel when you first learned that...?
 - Why do you want to continue a business relationship with X?
 - What happened after you first noticed...
 - Describe the kind of streets that are at the intersection.
 - **c. Requests for Clarification** - open to a degree but are even more focused than the two preceding types of questions
 - Could you explain to me how your product is not similar to product Y?
 - Help me understand why the lawnmower is not worth x.
 - What specifically about your health is your main concern?
 - **d. Leading Questions** - suggest the answer often in terms of one or two words
 - What color was the car that hit you?
 - **e. Either/or, Yes/No Questions** - close ended
 - Were the headlights either too bright or too dim?
 - Tell me, yes or no, do you want to be friends with Steve?
 - **f. Compound Questions** - more than one request for information and should be avoided
 - **Questions should be as neutral as possible**-however, is likely that some questions will elicit judgmental, value-laden information from the parties
 - Judgmental response language types:
 - Should or have to - aimed at other side or party itself

- Explain rationale for choosing party to start
 - If no litigation yet-start with party making the complaint (one responsible for getting issue to the mediation process)
- Begin with broad request for information - "Tell us what brings us here today."
- **1. Importance of Opening Remarks**
 - First time parties actually listen to an uninterrupted statement of the case from the other side's point of view
 - First opportunity to get it off their chests
 - Important for mediator to be patient and model good listening skills (will encourage others to listen as well)
 - Pay close attention to non-verbal communication of the non-speaking parties
 - No one should interrupt the speaker during time reserved for opening remarks
 - Unless very confusing and if develops into negative exchange - then appropriate for mediator to intercede and take control
 - Disagreement is expected
 - Mediator should not call attention to potential conflicts, but should be mindful of them and possibly address them in private sessions
- **2. Parties**
 - Individual's day in court
 - Ventilation, expression of anger, frustration and other emotions should be encouraged
 - If confused about opening statement, ask for clarification when party complete with statement
- **3. Attorneys**
 - If attorney attends mediation, there is usually a lawsuit pending
 - Lawyer should be attending to represent best interests of client
 - Possible conflicts include financial interest and interest in establishing a trial record
 - Some lawyers utilize adversarial approach in opening statements- mediator should attempt to constrain some of this prior to presentation
 - Stress that mediation is different than the adversarial setting of the court room
- **4. Other Representatives**
 - May include friends, relatives, accountants, financial planners, therapists, counselors
 - Offer supportive role or attend in active representative capacity
 - Mediator should understand how much decision making authority the representatives have
 - May be given opportunity to make opening statement
 - May need translators - try to get neutral party, but may not be possible
 - However, request and accurate and direct translation be provided
- **5. Use of Documents, Witnesses, and Experts**
 - May use documents, witnesses, and experts to clarify certain points

- Limiting - party closes himself to certain options or ideas
 - Blame - one person blames the other for the event
 - Value - assign value to an activity (right or wrong)
 - Assumptions based on inferences
- Mediator should refrain from commenting on judgmental responses
 - Mediator should try to neutralize this language when being a summarization
- **2. Additional Information Gathering by Participants**
 - Parties are often present to only gather information about the other side's view of the case
 - Parties can better assess their cases for purposes of settlement
 - Mediator should permit questioning to take place between parties across the table
 - Mediator should stay in control

Chapter Seven - Neutrality

A. Overview

- Mediator must remain neutral before during and after mediation session
- Neutrality is not very well defined
- Often used interchangeably with a variety of other words and phrases:
 - Impartiality
 - Free from prejudice or bias
 - Not having a stake in the outcome
 - Free from conflict of interests
- Other synonyms include:
 - Unbiased
 - Indifferent
 - Independent
- Dissension among mediation community whether these terms really define neutrality
- Mediators generally viewed as neutral-but there may be an underlying duty to be fair
- Some believe mediator just needs to separate her opinions of the outcome of the dispute from the desires of the disputants
- Mediators may have to provide information and educate participants to help them be better able to make informed decisions-**four models of autonomy:**
 - **Paternalistic or dictated autonomy**
 - Mediator acts primarily as parties surrogate in assessing what outcome might be best
 - Party's decisions supported by the mediator's presentation of selected information as well as by the mediator's explicit opinion of what should be done
 - **Instrumentalist or limited autonomy**
 - Party's objective is simply to reach settlement

- Positive reinforcement is a powerful motivator for most individuals
 - Mediator should always try to point out the positive aspects he sees in the dispute
 - Because mediator in objective chair, he is more likely than any of the parties to see some middle ground or to observe that there is not as much disagreement as each side may initially perceive and to identify areas of overlapping interests (such as supplier/purchaser or best interests of the children)
 - After mediator restates, he may ask each of the parties to restate what they think the other party has said
 - Other mediators may request that the participants do all of the restating
 - This may be done by asking each party to restate the opposing view before they put forth their response, position or statement
 - Use caution with this approach because many individuals may be uncomfortable with this approach and mediator may lose trust and cooperation
 - Usually try to avoid single issue cases - more likely to lead to positional, distributive negotiation
 - Mediator can try to fractionalize the issue (break into smaller components, to create more items for discussion and bargaining)
 - Mediator must careful to not make a premature assessment that he has reached the conclusion of information gathering
 - Early determination of issues can also be limiting
 - Since these items are subject to change, mediator must never close his mind to additional issues as the process continues
- **B. Setting the Agenda**
- Mediator should approach agenda setting and discussion of issues in way that can minimize the dispute
 - Sometimes matters not complex-mediator does not need to consider agenda options
 - Different approaches to agenda setting:
 - **Ad hoc**
 - Mediator proposes examination of an issue as it is discussed
 - Parties analyze it thoroughly until they reach a resolution
 - **Simple agenda**
 - Used if one main issue
 - Primary item is dealt with and settled before discussion of others is commenced
 - Not applicable if a number of issues with varying importance or if have contingent issues
 - **Alternating choices by the parties**
 - Allows parties to alternate choosing the topic of discussion
 - Provides parties control of the process
 - Choosing who goes first can be problematic
 - Works well where parties are experienced negotiators and level of conflict is minimal

- 1. Process
 - Fairness in negotiation process has four components: Structural, process, procedural and outcome fairness
- 2. The Result
 - Even if balance at mediation table, parties may reach outcome that mediator believes is unfair and unbalanced
 - Mediator should ensure against an agreement tainted by fraud, duress, overreaching, imbalance in bargaining leverage or basic unconscionability
 - But questions because judges and juries differ-therefore how could mediator make this call
 - If such standards are established, will accurate predictions lead to an increase in claims of mediator malpractice
 - If parties are satisfied and no illegality, agreement should be executed
 - If mediator feels that may attempt to influence outcome-should not take the case

Chapter Eight - Identification of Issues and Interests

- Stage called issue identification or issue determination
 - These matters usually have not been disclosed by this stage
 - Therefore, mediator should initially focus on identification and restatement of main or apparent issues
 - Recommended that mediator have parties together for this stage - allows both parties to hear the other parties' issues expressed (puts them in a position to better understand that different issues exist for each side)
 - If do caucus, usually the issue is confidential (issues need to be openly discussed in order to be resolved)
 - Once issues identified, mediator should restate and reframe them in way that will leave parties open to a variety of potential solutions
 - Once obtain party agreement o specific issues, mediator should determine an agenda for mediation, particularly in complex cases
- A. Identify, Reframe and Restate: The Use of Language
 - Restating and reframing - key tools for mediator
 - Restate - stating a few sentences in a way that reflects what the speaker said, but with a slight change of focus, or removing offensive language
 - Reframe - statement about the problem or issues and is used to help the parties to view the problem or concern in a different light
 - Often removes statements of direct blame
 - Convert to neutral language and broad view of the issues - parties often then become open to more creative problem-solving approach
 - These tools let the parties know that they have been heard and understood by the mediator; will also assist others at table hear the other point of view
 - Can use the one issue approach if the issues are not complicated
 - This method completely resolved each issue raised prior to identification of new issues

- **Principled**
 - Mediator and parties establish general principles that form the framework for the settlement
 - Specific details of how these principles will be applied to specific issues then follows
 - One example is in the business context: parties agree in principle to renegotiation of a contract (specific contents are then addressed)
- **Less difficult first**
 - Mediator identifies those issues where probability of agreement is high
 - For these easy items, parties move quickly to resolution at the beginning of the agenda
 - Reaching early agreement on some matters promotes an atmosphere of agreement
 - Risk: if final agreement is not reached, the parties will feel as if the mediation has resulted in a waste of time and money
- **Most difficult first**
 - Likely other issues will fall into place
 - Risk: can result in early termination of the session if agreement is not attained
- **Order of importance**
 - Parties with mediator choose the most important items for each of them to be placed first on the agenda
 - These are likely the primary source of conflict and therefore the most difficult
- **Building-block or contingent agenda**
 - Mediator identifies issues which must be dealt with first because they provide the groundwork or foundation for later decisions
 - Parties must clearly express and understand the contingent nature of the issues
 - In cases where the issues are interrelated, this approach can prevent deadlocks due to incorrect sequencing of issues
- **Tradeoff or packaging**
 - Parties unwilling to move on a single issue will often use combination of issues
 - Offers are made in return for concessions
 - Trading can also be conducted on an issue by issue basis so that all issues are eventually resolved
 - Packaging of proposals which contain multiple-issue solutions can be particularly effective where the issues are linked

Chapter Nine - The Negotiation Process

- **A. General Overview**
 - Negotiation is much like sex---something most of us do at various points in our lives, yet no one has taught us anything, nor is there much open discussion about it

- Negotiation is at the heart of all settlement-it is part of everyday life
- Six stage model of negotiation:
 - Planning and preparation
 - Establishing initial relationships between negotiators
 - Opening offers or initial proposals
 - Information exchange
 - Narrowing of differences
 - Closure
- More detailed model:
 - Preparation and planning
 - Ice breaking
 - Agenda control
 - Information bargaining
 - Proposals, offers, demands
 - Persuasion/justifications
 - Concessions/reformulations
 - Crisis: resolution or deadlock
 - Closing
 - Memorialization
- **B. Negotiation Theory-negotiation methods**
 - **Distributive**
 - Zero sum game-where there is fixed quantity of resources, one person's gain is necessarily the other's loss
 - Direct conflict of interest between the parties
 - Adversarial competitive style is most often observed
 - Ex. two partners negotiate how to split a monthly profit
 - **Integrative**
 - Exploration of a number of options
 - Expanded pie - provides an opportunity for mutual gain in negotiation
 - Interests of parties are not necessarily in direct conflict and therefore, there is not an inverse level of satisfaction inherent in the process
 - Room for creativity and a collaborative problem solving approach is usually observed
 - **Positional** (similar to distributive)
 - Parties align themselves to a position and spend effort defending it against attack
 - Parties sometimes do not focus on what they really want
 - Hard style negotiators are adversarial and confrontation, but this style has soft style of friendly, cooperative manner
 - Soft negotiators often yield and concede to avoid confrontation
 - **Principled** (similar to integrative)
 - Attempt to identify underlying interests and come up with number of alternatives for settlement
 - Looks for possible solutions which might satisfy everyone's interest, with the objective being a final resolution with which everyone is satisfied

- Interest-based (similar to principled)
 - Look to underlying interests of parties
 - Also known as mutual gains bargaining
- Rights-based (similar to positional)
 - Look to entitlement of rights between the parties in an attempt to determine a solution based on those rights
- Win-Lose
 - Similar to distributive or positional
 - One party will win and get more, while the other party necessarily gets less
- Win-Win
 - Usually when use integrative, principled or interest-based process - get joint gain and mutual satisfaction
- Many mediators recommend the integrative, principled approach
- **C. Common Styles and Tactics**
 - Highly effective negotiators have traits including preparation, adherence to ethical guidelines, trustworthiness, and honesty
 - Negotiator should weigh carefully both the pros and cons of use of these tactics
 - Some common strategies include:
 - Use of additional individuals on the negotiating team
 - Making an initial large demand or low offer
 - Negotiating with limited authority
 - Displays of real or feigned anger/intimidation
 - Making false demands
 - Proposing "Take it or leave it"
 - Creating/inducing guilt
 - Acting like Mutt and Jeff
 - Claiming alleged expertise/putting on a snow job
 - Using a Brer Rabbit-like reverse psychology
- **D. Common Problems in Negotiations**
 - Lack of knowledge or skill about the process
 - Lack of preparation and planning for negotiation contributes to very haphazard approach to process during mediation
 - Parties' lack of specific focus or ability to keep on track
 - Parties may have failed or refused to exchange information
 - Without information, informed decisions cannot be made
 - Intermediary may assist in this exchange
 - Help overcome myth that making the first offer is a sign of weakness
 - Inability of some parties to take responsibility for finding a solution
 - Some people mistakenly believe that there is a single "right" answer to any dispute or problem
 - Four barriers
 - Strategic barrier - suggested by game theory and economic analysis of bargaining
 - Relates to tension between discovering shared interests and maximizing joint gains AND maximizing one's own gains where more for one side will necessarily mean less for the other

- Principal/agent barrier - principals often do not negotiate (they act through agents)
 - Cognitive barrier - relates to how human mind processes information, especially in evaluating risks and uncertainty
 - Reactive devaluation - draws on social psychological research
- Ways that neutral third parties might help overcome each of these barriers:
 - Strategic barrier
 - Neutral may be able to induce the parties to reveal information about their underlying interests, needs, priorities, and aspirations that they would not disclose to their adversary
 - Skilled mediator can often get parties to move beyond political posturing and recrimination about past wrongs and to instead consider possible gains from a fair resolution of the dispute
 - Principal/agent barrier
 - Mediator may help bring clients themselves to the table and help them understand their shared interest in minimizing legal fees and costs
 - Cognitive barrier
 - Mediator can help each side understand the power of the case from the other side's perspective
 - By emphasizing the potential gains to both sides of the resolution and de-emphasizing the losses that the resolution is going to entail, mediators often facilitate resolution
 - Reactive devaluation barrier
 - Can be sidestepped if the source of a proposal is neutral-not one of the parties
- **E. The Mediator as Conductor for a Negotiation Dance**
 - Negotiation can be seen as a dance
 - It takes two to tango and to negotiate
 - In both, some individuals go more willingly than others
 - Like two dancers, negotiators may proceed very quickly and deliberately, certain of their direction and steps
 - In other instances, they may hesitate or step on each other's toes
 - Mediation provides environment in which an offer is not only acceptable, but also expected
 - This removes the negotiation stigma that unfortunately has been attached to making the first move
 - Mediator's role in this regard is not to only encourage movement by the parties, but also to encourage the parties to negotiate more reasonably
 - Tempo of the music or timing of the offers, can also be directed by the mediator
 - In a neutral, objective role, the mediator is more able to recognize alternatives or options as possible solutions which might be likely to satisfy all the parties at the table
 - Often, the parties may reject these ideas and refuse to continue dancing
 - Mediator may point out the similarities in music and dance steps

- and help the parties continue
- If negotiators grow tired, the mediator can assist in moving them- she keeps the music playing

Chapter Ten - Finding a Resolution

- Mediator needs to provide guidance of the process of problem solving
- Finding resolution is key to the goal of finding and agreeing on a solution which all parties will be able to live and in which all parties can find at least some satisfaction
 - o If participants find and agree to solutions-solutions are generally more satisfactory to disputants because they are crafted in a way that accomplished the goals of both parties
- **A. Overcoming Reluctance With Problem Solving**
 - o People often assume there is one solution and their focus is narrow and restrictive
 - o But, disputes involve many people with different feelings-therefore everyone has own idea for a solution and collaboration in developing options does not come naturally to most
 - Therefore, mediator's task is to move parties away from searching for single, right solution-broaden the parties' perspectives
 - o Each person must share responsibility of collaboration and responsibility for process
 - o Helpful if mediator explains difference between trial and mediation
 - Trial - focus is on the past
 - Mediation - focus is on the future
 - o To help parties not immediately try to resolve dispute:
 - Allocate "thinking" time
 - Restatements in broader terms
 - Focus on future benefits of amicable solution
- **B. The Caucus**
 - o Mediator meets privately with each party or combination of parties
 - Because parties not always candid in front of all participants
 - Benefits:
 - To gather additional information or to explore alternatives
 - Allows party to vent in private and avoid damaging relationship between the parties
 - Prevents one party, or an attorney, from manipulating another
 - Provides other party down time to relax or to gather additional information necessary
 - Difficulties:
 - Perception of alliance of bias based on time spent with each party
 - Greater potential for mediator to become biased
 - Important for parties to engage in joint problem solving
 - Effective if parties are hostile and unable to generate options
 - Confidential and mediator shares only information she has been given permission to divulge
 - Some cases - opposite-cant transmit any information he

determines to be helpful to the process, unless specifically told otherwise by the party

- Strategies:
 - Assist parties in evaluation of the case
 - Urge participants to take realistic look at their objectives
 - Educate parties about negotiation process
- **C. Impasse, and the Ways Beyond**
 - Tools to get past roadblocks:
 - Change focus or topic
 - Start over
 - Divide or break down the issues
 - Take a break
 - Be silent
 - Discover or remind parties of their BATNA
 - Use words of encouragement
 - Call a caucus
 - Come back together
 - Bring in snacks
 - See if partial agreement can be reach
 - Use humor
 - Turn to outside experts
 - Call it quits
- **D. Problems in Generating Alternatives**
 - Many hesitate to advance ideas for resolution
 - From apprehension and fear of rejection of offered ideas or fear ideas will be criticized or not accepted
 - Emotional aspects often impair willingness to hear or trust the content of any option generated by other side
 - Mediator's task - create environment where parties are no longer reluctant to generate or identify a variety of options for settlement
 - Encourage parties to be more willing to explore suggested ideas
 - Mediator can:
 - Explain that essential part of mediation process is to identify and consider all options
 - Judgment can hinder imagination, so separate the inventing from the deciding
 - Not rush critical stages
- **E. The Importance of a Number of Options**
 - Payment of money often viewed as solution to problem
 - However, there are a variety of alternative that might be suitable
 - Important that parties be open-minded to broad range of possible solutions
 - Even though parties may want to complete their opening statement with a demand-mediator should explain that there will be time later for examining a number of options
 - Devote a phase to allowing exploration and creative thinking to occur
 - Parties will be better able to fashion a resolution with which they are truly satisfied because they have a direct hand in creating it
 - Creation or identification of options and alternatives is separate from the actual selection process-brainstorming session

- Usually is a direct relationship between the number of options available and the likelihood of attaining a final resolution
- **F. Use of Lateral Thinking**
 - Thinking is a skill-some are better at it than others
 - Thinking slowly and deliberately can increase the effectiveness of the thought process
 - Lateral thinking defined in dictionary as "pattern switching within a patterning system"
 - Is an attitude and set of skills
 - Mediators must at least possess the attitude
 - Way of looking at things with insight, creativity and humor
 - Used to generate new ideas or invention
 - More deliberate than creativity
 - Allows jumps in different directions and nothing should be excluded from consideration
 - Final result is unpredictable
 - Complementary with vertical thinking - after lateral thinking to formulate all ideas, use vertical thought process to select and the ideas to their best use
 - Be careful to avoid making statements that favor or focus on specific solutions prematurely
 - Remind parties that mediator's role is to assist the parties in creating their own solutions
 - Mediator can still be thinking of options and as last resort if parties unsuccessful
 - Be careful not to allow the parties to see the suggestion as the answer - suggest them as possible ideas
 - Number of options generated will depend on case and its appropriateness for creative solutions
 - Suggestion of one idea may stimulate another
 - Mediator remind parties that just because one individual puts forth an idea, that person does not own it or that the party suggesting the idea even agrees with it
 - Mediator should not indicate feelings or judgments of any ideas
 - Option generation may be hindered using the caucus format
 - However, parties may be more likely to disclose their true interests and therefore bring out options which are workable and acceptable
 - Need for apologies
 - Often has a positive effect
 - Plaintiff's lawyers usually shrug off client's desire for an apology
 - Defendant's lawyers steer clear of any expression that might be construed as an admission of liability
 - If concerned about client satisfaction-should strongly consider demands for apologies
 - Four variations for apologies with "I'm sorry" as the common denominator
 - Tactical apology.- attempt to build a relationship in order to influence opponent's bargaining behavior
 - Fundamentally competitive, not cooperative
 - Explanation apology - mock regret to rebuff an accusation

- and then generates an account to defend past behavior
 - Sarcastic apologetic gesture may acknowledge the other party's feelings, but it avoids implicating the speaker in a wrongdoing
 - Formalistic apology - restoring social harmony is the most important goal of dispute resolution, well performed gestures of submission like the formalistic apology may result in absolution
 - Happy-ending apology - parties may engage in sort of tearful reconciliation that signals the happy-ending
 - Hearer should be convinced that the speaker
 - Believes she was at least partially responsible
 - For an act
 - That harmed the hearer and
 - Feels regret for the act
- **G. Selections of Alternatives**
 - "You can't always get what you want ... But if you try, sometimes, you just might find, you get what you need"
 - Proceeds naturally after brainstorming complete
 - Evaluate alternatives
 - Choose one as a solution
 - Mediator should review and clarify all elements of the solution - ensure everyone has same understanding about components
 - Then can finalize the agreement

Chapter Eleven - Confidentiality

- **A. General Policy Considerations**
 - Trust is element of mediation closely related to confidentiality
 - Establishing trust between participants and mediator is at core of process-there will be more disclosure of important information and personal needs
 - In separate and confidential caucuses
 - Parties more willing to make disclosures and openly discuss their underlying interests, needs, wants, and desires only if the process is confidential and items discussed are protected
 - Confidentiality important to mediator neutrality-if can report to another entity, there will be perception of affiliation with that entity
 - Confidentiality limits mediator's involvement in continuation of the case
 - Since mediators are prohibited from disclosing anything that happened in the mediation, parties might misuse the session to delay trial
 - However, may be against public policy to preserve confidentiality-if matters affect general public or environment
 - May have duty to disclose if someone may be physically harmed
 - Duty to report child abuse
 - Texas confidentiality provisions:
 - Process issues relating to what extent confidentiality is necessary

to achieve the objectives of ADR within the context of the particular dispute

- Need to encourage parties to speak freely in mediation
- Public access issues relating to claims of overriding public interest in insuring public access to information communicated in ADR proceeding
 - Issue that glare of public scrutiny promotes proper procedures and militates against settlements that are contrary to public interest

- **B. Exclusion or Privilege**

- If statute provided for confidentiality in mediation-courts will often uphold it
- Extremes:
 - Secret-means not to be disclosed to anyone-ever
 - Confidential-means mediation is protected from disclosure to the court, but it can be disclosed to the rest of the world
- Middle approach:
 - Only participants plus individuals directly related to and affected by dispute, will know about the case and details of mediation
- 1. **An Exclusion - Scope and Limits**
 - Federal Rule of Evidence 408 - prohibits use of settlement offers as evidence of liability in trial of lawsuit-encourages settlement agreements
 - Parties would hesitant to engage in settlement negotiations if something stated could be used against them in a subsequent trial
 - Silent on whether information disclosed in a compromise discussion could be discussed with other entities, including the press
 - Excluded if used to prove the validity or invalidity of a claim or amount
 - Statements can be admitted if offered for other purposes
- 2. **Privilege**
 - Involve parties in a relationship and generally prohibit disclosure by one party of information revealed by the other
 - May prevent disclosure for any purpose
 - To determine a claim of privilege against disclosure, four-part test (Wigmore):
 - Requires that:
 - Communications must originate in confidence that they will not be disclosed
 - Element of confidentiality must be essential to the full and satisfactory maintenance of the relations between the parties
 - Relation must be one which in the opinion of the community ought to be sedulously fostered
 - Injury that would ensue to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation
 - For mediation, met using a balancing test

- Question of who the privilege is held by-mediator and/or participants?
- **C. Confidentiality Agreements**
 - Non-litigation - likely that courts would enforce a confidentiality agreement unless other laws mandating disclosure take precedence
 - Must be a threatened or actual disclosure before court will intervene
 - Agreement does not guarantee protection
- **D. Court Orders**
 - Courts can order parties to maintain confidentiality, specifically through a protective order
- **E. Discovery Considerations**
 - Can exempt from protection matters otherwise discoverable
 - Fact that it is discussed in mediation does not protect it from discovery
- **F. Duties to Disclose**
 - Some claim that mediator's duty to preserve confidentiality is paramount
 - If criminal D needs testimony of mediator as a defense, court may require mediator's cooperation
 - Duty to report child abuse
 - Identify to whom the disclosure should be made (who does the mediator owe the duty to)
 - Determine type and degree of disclosure should be made (extent of disclosure)
 - General duty to report crime (protect others from potential harm)
 - Each mediator will have to make independent judgment call on many of these issues
- **G. Current Legal Parameters**
 - **1. Generally**
 - National Labor Relations Board v. Joseph Macaluso, Inc.
(NLRB ordered employer to execute contract and pay back compensation with interest; NLRB sought enforcement of its order)
 - **Held:** NLRB can revoke the subpoena of a Federal Mediation and Conciliation Service mediator capable of providing information crucial to resolution of factual dispute solely for purpose of preserving mediator effectiveness)
 - United States v. Gullo (Ds charged with participating in use of extortionate means to collect, or attempt to collect, extension of credit brought motions to dismiss indictment and various other pretrial motions)
 - **Held:**
 - 1. Statements made during dispute resolution process at community dispute resolution settlement center in NY State were privileged and would be suppressed
 - 2. Revelation of privileged matters to grand jury did not require disclosure of minutes of grand jury proceeding
 - Hudson v. Hudson (dissolution proceedings - court entered final judgment of dissolution and denied husband's motion to vacate that judgment)
 - **Held:** former wife's introduction of mediation proceedings

into dissolution trial violated letter of mediation statute and required vacation of judgment and new trial

- **Schneider v. Kreiner** (after former husband and his former wife reached voluntary settlement in child custody matter before Municipal Court Private Complaint Mediation Service, husband requested access to entire mediation file-Service denied the request and husband petitioned for writ of mandamus)

- Held; mediation complaint completed by mediation was “mediator communication”, disclosure of which was precluded

- **In re: Grand Jury Subpoena Dated December 17, 1996** (individuals who had participated in mediation session under an agricultural loan mediation program sought to quash a grand jury subpoena served on program’s custodian of records that demanded information relating to the session-court quashed the subpoena and government appealed)

- Held:

- 1. Individuals had standing to challenge the subpoena
 - 2. Issue was not moot even though the information had been turned over the grand jury
 - 3. No evidentiary privilege existed against disclosure of information to the grand jury

- **Folb v. Motion Picture Industry Pension & Health Plans** (former employee of pension and health plans brought suit against the plans, claiming that they discriminated against him on basis of gender, and that they relied on a complaint that he had sexually harassed another employee as a pretext to discharge him in retaliation for his whistle-blowing activities regarding plan directors’ alleged violations of fiduciary duties under ERISA; employee objected to judge denying his motion to compel production of documents)

- Held:

- 1. Federal law of privilege governs both federal and pendent state law claims in federal question cases, and federal courts should not look to the law of the forum state as a matter of comity
 - 2. Federal mediation privilege applies to all communications made in conjunction with a formal mediation proceeding
 - 3. Allegedly harassed employee did not waive that privilege

- **In re Waller** (attorney disciplinary proceedings - falsely and with intent to deceive, stated to court that he had previously lied to a court-appointed mediator about his representation of a third-party (a surgeon) and about his reason for that lie)

- Held (based on report and recommendation of Board of Professional Responsibility):

- Misrepresentation to court warrants suspension from practice of law for period of 60 days

- **H. Conclusion**

- Most important task for mediator and mediation advocate is to determine

status of law with regard to confidentiality

- Be very careful to clarify the limits and extent of confidentiality with all participants

Chapter Twelve - The Mediated Agreement

- Final settlement should not be full measure of success
- **A. Finalizing the Mediated Agreement**
 - Mediator should have notes identifying all interests, issues, options and agreements
 - Therefore, important for all to be active in finalizing the agreement and assuring that all of the items previously identified have either been addressed or purposefully disregarded
 - Three elements of satisfactory agreement:
 - Procedural satisfaction
 - When each party has actually participated fully in the process or feels that she has been provided the opportunity to participate without pressure
 - Psychological satisfaction
 - Opportunity to be heard and to express their anger, frustration, disappointment, sadness or other emotion
 - Substantive satisfaction
 - Mediator has identified interests of each party and those interests are satisfied
 - **1. Pressures to Settle**
 - From judge by its mere referral of pending lawsuit to mediation process
 - From mediator-difficult to determine how far to go in motivating the parties to settle
 - Assist in reality testing by stating that court may be displeased if this case does not settle
 - **2. Contents of the Agreement**
 - Main reason for failure to comply with mediated agreement is lack of clarity in final agreement
 - Ask: CAN IT BE DETERMINED, FROM READING THE AGREEMENT ALONE, WHO WILL DO WHAT, WHEN, WHERE, HOW AND HOW MUCH?
 - If answered affirmatively, mediator's job is complete
 - If not answered affirmatively, must continue to clarify issues
 - Mediator helps assist parties in determining if what they are intending to agree to is really possible and how exactly it will be carried out
 - If reality testing sensitive (involves finances) - meet with parties separately
 - Controversy over whether mediator has duty to assure that the agreement is fair
 - Must determine specifics of implementation, which may include:
 - Specific date for each monthly payment
 - Location where payment is to be made
 - How payment is to be made - i.e., mail, in person, etc.

- Whether personal check, credit card, etc.
- Be careful not to include in the agreement a provision which requires an action on the part of someone who is not present at the session (could first verify with third party by telephone)
- Mediator should help with examination of contingencies
 - Assist with identification of potential problems and finding alternative courses of action
- Do not include recital of fault
 - Because of...
 - Due to...
 - As a result of ...
- **3. Partial Agreements**
 - Can have-be flexible when finalizing the agreement
 - Can have statement of general intent to agree, or an agreement in principle, which leaves specific details to be worked out at a later date
 - Mediator should be able to recognize, identify, and clarify a partial agreement-may include specifics of reschedule date
- **4. Form of the Agreement**
 - Depends on nature of case and whether or not lawsuit is pending
 - Self-executing agreement - carried out completely at time of agreement
 - Related to enforceability
 - Some statutes require a valid contract for mediation to be enforceable
 - Consider form in terms of parties and their needs and also in light of enforceability issues
 - Least formal - oral agreement
 - Mediator must restate what the terms of the agreement are, and perhaps even have the parties state to each other what they agree to do
 - Mediator responsibility to take detailed notes so that he can rely on these notes to firm up all details
 - Agreement in principle - arrive at general agreement which includes further details that need to be worked out at a later time
 - **a. Non-Litigation Cases**
 - Attorneys usually not present
 - Possible to utilize oral agreement
 - Assure have written enforceable contract
 - **b. Pending Lawsuits**
 - Must determine effect of mediated agreement on lawsuit
 - Dismissal of lawsuit
 - Finalization of lawsuit in terms of an agreed judgment
 - Incorporate mediated agreement into final papers or judgment of case
 - Continuation of lawsuit with certain stipulations
 - Court approval of mediated agreement:
 - Final agreed or stipulated judgment of court
 - Incorporate agreement by reference into final decree of court

- **B. Drafting Issues**

- Form of agreement
- Contents of agreement
- Enforceability
- Whether drafting of mediated agreement is the practice of law
 - Whether legal malpractice if draft faulty agreement or make mistake
- Whether mediation is the practice of law-issues of mediator certification, regulation and ethics
- Suggests mediator compose only a memorandum of agreement
 - Watch for parties expecting mediator review the agreement in terms of legal insufficiency

- **C. Enforceability**

- **Barnett v. Sea Land Service, Inc.** (vessel owner appealed from order which rendered judgment for longshoreman in his negligence action)
 - **Held:** Evidence of settlement that had allegedly been reached during mediation session was properly excluded
- **Rizk v. Millard** (petition filed for writ of mandamus to challenge an ordered entered striking relator's pleadings and granting default judgment against him in breach of contract action)
 - **Held:**
 - 1. Relator had right to revoke his consent to settlement agreement
 - 2. Trial court had no authority to impose discovery sanctions when relator repudiated unsigned settlement agreement forged in mediation
- **Colleen Bennett v. Lloyd Bennett** (judgment granting wife divorce-husband appealed)
 - **Held:** Wife could not be compelled to sign alleged mediated agreement
- **In the Matter of the Marriage of Ames** (husband sued for divorce and wife counter petitioned for divorce; parties ordered to mediation and reached community property settlement agreement, from which husband later tried to withdraw his consent; wife filed motion for entry of decree of divorce based on settlement agreement-court entered decree of divorce and husband appealed)
 - **Held:**
 - 1. Settlement agreement reached through mediation was binding and could not be repudiated
 - 2. Trial court should not have divided property differently from how it was divided in settlement agreement
 - 3. Husband entitled to new trial based on inconsistencies between settlement agreement and divorce decree
 - On rehearing - could not modify property division, since it had to strictly comply with terms of settlement agreement
- **Patel v. Ashco Enterprises, Inc.** (following breach of mediation agreement, employer filed suit to enforce agreement's terms against former employee-court enforced parties mediation agreement and employee appealed)
 - **Held:** mediation agreement was enforceable even though agreement was executed while litigation was pending in county

court and county court's jurisdiction to consider employer's noncompete claim was subject to challenge

- Silkey v. Investors Diversified Services, Inc. (investors sued securities brokerage and its registered representative for misrepresentation, violations of state securities law, breach of fiduciary duty, and constructive fraud; court ordered mediation resulted in oral settlement agreement, but investors later refused to sign written agreement, so defendants moved to enforce agreement; court granted motion and ordered reduction of agreement to writing-investors appealed)

▪ **Held:**

- 1. Oral agreement was enforceable
- 2. Court had power to order reduction to writing
- 3. Though it was possible that agreement would not be performed within one year, it was not within the Statute of Frauds

- Allen v. Leal (parents of shooting victim brought civil rights action against city and police officers; Ds filed counterclaim for breach of contract based on parents' alleged breach of mediated settlement; mediator accused of being coercive and bullying in obtaining a settlement)

▪ **Held:**

- 1. District could would not exercise its supplemental jurisdiction over the breach of contract counterclaim
- 2. Coercion or bullying is not acceptable conduct for a mediator in order to secure a settlement

Chapter Thirteen - Closure and Follow-Up

- **Formal closure to mediation is important**

- Might be handshakes combined with exchange of executed agreement
- Might be more extensive particularly where there has been reconciliation between the parties
- To enhance likelihood of compliance with agreement
- Allow parties to complete closing remarks
- Mediator must be vigilant that parties may have real closure needs that attorneys may be completely unaware of
- Mediator should directly inquire about client's needs and implement a process which meets the parties needs
- Mediation process, if allowed to, can do more than deliver a monetary settlement-process can provide an avenue for conciliation and forgiveness and allow parties to leave with a sense of hope and peace
 - Provides avenue for real human expression
- Parties may have no desire for conciliation - cases that involve allegations of fraud or purposeful, intentional acts
 - Don't coerce parties to achieve closure if they have not desire for it-respect parties' desires

- **A. Concluding the Mediation**

- Understand time frame
- If don't achieve settlement, close the session
- **1. Closure With Formal Mediated Agreement**
 - Agreement is reached, writing and signing agreement is not

- necessarily the final part of the process
 - Continue to maintain neutrality-refrain from providing business cards or soliciting business from parties or attorneys
 - Post mediation private conversation may demonstrate a lack of neutrality and cause other party to question mediator's neutrality during the session
 - In closing, make sure:
 - Parties have exchanged any necessary information such as addresses and telephone numbers
 - Everyone has a copy of the agreement
 - Any follow-up between the parties or mediator is clear and specific
 - All dates, times and places are clarified and preferably in writing
- **2. Closure Without Formal Agreement**
 - Mediation often closes with formal agreement
 - If no agreement reached, mediator need not explain to parties in detail why mediation is being terminated-only explain that have reached an impasse and should do in positive manner
 - Where there is concern for safety of party-ensure that parties leave separately
 - Be careful in recommending reschedule of mediation-can something really be achieved by meeting again?
- **B. Post Mediation Follow-Up**
 - If terminates without agreement, mediators will often continue negotiations with both sides by telephone to achieve a settlement
 - Do not continually harass the parties in hopes that they will be motivated to settle
 - Reasonable, non-coercive follow-up by mediator is appreciated by parties and viewed as evidence of mediator's sincere commitment to the process
 - If one or both of parties need additional information or more time to retrieve date, the mediator should write a memorandum or agreement to reflect that need, along with the time and place of the next meeting
 - If reschedule, have specific objectives in mind
 - Additional information required
 - Additional time to think about offer or proposal
 - Always close session with goals and objectives for any follow-up meetings clearly understood by all participants

Chapter Fourteen - Ethical Considerations

- Ethics - discipline of dealing with what is good and bad and with moral duty and obligation
- Ethical - conforming to accepted professional standards of conduct
 - Or of or relating to moral action, conduct, motive or characteristics conforming to professional standards of conduct
- Confidentiality and neutrality are often considered ethical in nature
- Code of Ethics is necessity in the mediation practice

- Ethical guidelines also needed for others participating in the mediation (parties and attorneys)
- **A. Mediator Ethics**
 - o Mediation has not yet been formally established as a profession
 - Flexible process and flexibility is one of key benefits
 - Therefore, mediator ethics would also need to possess elasticity
 - Challenge - create guidelines that are sufficiently specific in directing mediator conduct yet simultaneously allow for some individual leeway
 - o **1. Historical Overview**
 - Mediation centers decided that a code of ethics (or at least a set of guidelines) was needed to provide some answers for the mediators
 - Fundamental differences in the roles of the advocate and the mediator prevent wholesale adoption by mediators of the lawyer's code of professional responsibility
 - o **2. Current Codes**
 - Mediator's duties may be determined by type of case, background of mediator, agency in which case is mediated, or place of referral (such as court)
 - Many codes are in existence-makes it difficult for mediator to determine exactly what code of ethics to follow
 - Fortunately, most code provisions are consistent
 - Practice issues included
 - Conflicts of interest
 - Mediator's role
 - Impartiality and confidentiality
 - Providing professional advice
 - Fees, advertising
 - Fairness of agreement
 - Qualifications, training and continuing education
 - Also include mediator's responsibility to the courts, self-determination of the parties, interests of outsiders and absent parties, separate caucuses and use of multiple procedures
 - o **3. Issues Surrounding the Use of a Code of Ethics**
 - Present challenges include:
 - Interdisciplinary nature of the field
 - Inherent flexibility of the process
 - Lack of an enforcement authority
 - Problems as basic as defining the process to be regulated
 - o **4. Areas for Ethical Consideration**
 - Findings of research indicate concerns with: confidentiality, conflicts of interest (how neutral the mediator must be), competency, preserving impartiality, informed consent, preserving self-determination, provision of counseling and legal advice and avoiding harm and abuse in the process
 - Issues when mediator is advocate for settlement-does she have interest in outcome
 - Issues if mediator provides advice or information-role could be viewed as an advocate-should really only advocate to obtain independent legal counsel
 - Fees should be reasonable and advertising truthful and misleading

- Prohibitions against contingency fees is common
- 5. Joint Code
 - Latest efforts between American Arbitration Association (AAA) and the American Bar Association (ABA) and the Society of Professionals in Dispute Resolution (SPIDR)
 - Proposed Model Standards of Conduct for Mediators
 - Purposes: promotion of integrity and impartiality in mediation, handling of conflicts and the appearance of conflict of interest, and the treatment of fees in mediation
 - Nine sections: Self-determination; Impartiality; Conflicts of Interest; Competence; Confidentiality; Quality of the Process; Advertisements and Solicitation; Fees; and Obligations to the Mediation Process
- Poly Software International, Inc. v. Su (software copyright dispute-both parties moved for disqualification of the other party's attorney)
 - Held:
 - 1. Defendant's attorney was not precluded from representing defendant on grounds of former representation of plaintiff
 - 2. Where mediator has received confidential information in course of mediation, that mediator should not thereafter represent anyone in connection with same or substantially factually related matter unless all parties to mediation proceeding consent after disclosure
 - 3. Plaintiff's attorney's previous role as mediator in dispute between software company and plaintiff and defendant, who were then partners in their own software venture, required disqualification of plaintiff's attorney and his law firm
- McKenzie Construction v. St. Croix Storage Corporations (court ordered mediation as unsuccessful and parties resumed preparation for trial-Ds filed motion to disqualify P's law firm, which hired mediator appointed to settle case)
 - Held:
 - 1. Attorney, who served as mediator in unsuccessful mediation prior to joining law firm representing party in identical action, was required to be disqualified from representing party
 - 2. Disqualification of attorney was imputed to other members of firm
 - 3. Affidavits of P's law firm regarding mediator's involvement in case after being hired by firm were not patently false, and thus, did not warrant imposition of sanctions
- Fields-D'Arpino v. Restaurant Associates, Inc. (employee brought claims of gender and pregnancy discrimination in violation of Title VII, NY Human Rights Law, and Title 8 of Administrative Code of City of NY-moved to disqualify employer's counsel of record)
 - Held:
 - 1. Disqualification of employer's counsel was warranted

- 2. Although firm did not conceal or misrepresent its relationship with employer, firm held itself out to employee as an impartial mediator for purposes of conducting meeting with employee and employer prior to employee's filing of claim with the Equal Employment Opportunity Commission (EEOC), during EEOC trial firm attempted to exploit what attorney-mediator learned during the mediation in order to rebut employee's charge of discrimination, and firm intended to use its attorney-mediator as a witness at trial with respect to the purpose and content of the mediation, which gave the appearance of impropriety
 - 3. Mediation is inherently an informal approach to dispute resolution that lacks the exacting procedural rules of the judicial process
- **B. Ethics for the Advocates and Parties**
 - Parties might be bound by certain ethical guidelines associated with their primary profession
 - Majority of cases, these are appropriate, however many of these were not determined with mediation practice in mind
 - Ex. obligation of attorney to represent his zealously means something very different in trial than it does in mediation
 - Ex. attorney advocate in mediation would be examined using lawyer's code as if her were participating in a more traditional negotiation
 - Concern: whether or not attorney has duty to inform a client about the mediation option-probably
- **C. Ethical Considerations for Referring Agencies or Entities**
 - Agency referring parties to mediation is usually the court
 - Consider ethical obligation of the judge in making an impartial mediator selection
 - Resulted in promulgation of standards which define specific role of the court
 - Hope that all states will adopt these standards
 - Also concerns about requirement for court to determine that a mediator to whom a case is referred is competent, that the case is properly referred to mediation, and that the court does not receive confidential information from the mediator
- **D. Ethics for Organizational Providers of Mediation Services**
 - Organization providers of mediation services include dispute resolution centers and statewide offices of dispute resolution
 - Generally non-profit entities
 - Also are fee-generating private providers
 - These organizations should also abide by ethical standards including impartiality and confidentiality
 - Also, should avoid conflicts of interests
 - Are draft guidelines for organizations including
 - Providing quality and competence of service, duty to provide information, obligation of fairness and impartiality, access for low-income parties, disclosures of conflicts of interest, inclusion of complaint and grievance mechanisms, responsibility of organizations to require its neutrals to adhere to code of ethics,

prohibition against false or misleading communication, provisions of confidentiality

Chapter Fifteen - Quality Control

- Qualifications provide guidance to those considering mediating as a career
 - o Would provide mediation profession with legitimization of the field, with preparation for continued, organized growth of the mediation practice and standardization of processes and procedures
 - o Is fear that such limiting qualifications will retard the growth of ADR use
- Most existing quality control techniques have been tried in community or court annexed programs:
 - o Initial selection of individuals
 - o Mediator training and education
 - o Testing and evaluation of mediator's competencies
 - o Regulation by certification or licensing procedure
 - o Standards of conduct
 - o Establishment of liability
- **A. Background**
 - o SPIDR established a Commission, which established three central principles:
 - No single entity (but rather a variety of organizations) should establish qualifications for neutrals
 - Greater the degree of choice the parties have over the dispute resolution process, program, or neutral, the less mandatory the qualification requirements should be
 - Qualification criteria should be based on performance, rather than paper credentials
 - o Second Commission distinguished and defined terms of certification, licensure and regulation with precision, but failed to establish specific requirements
 - o Third Commission has been established - focus on reaching conclusions on precise and explicit qualifications
- **B. Qualifications**
 - o Educational backgrounds - most require an undergraduate degree and/or graduate degree
 - o Skills
 - o Training - some require
 - o General innate tendencies - personality, communication abilities and conflict management style
 - o Many worry that qualifications are subjective in nature and unfair if not applied consistently
- **C. Training and Education - Testing and Evaluation**
 - o Training programs range from 16-40 hours
 - Additional hours required in specialty areas such as family law
 - o Most educators use combination of lectures and role-playing
 - o Testing may include written examination or performance based testing
 - o Some require apprenticeship
 - o Other evaluation methods: settlement rates, user perceptions, opinions of

judges, attorneys and peers

- Even if don't receive letters or certificates of completion, may still mediate
 - Only Minnesota requires mediators to disclose their qualifications prior to mediation

- **D. Regulations, Certification, and Licensure**

- Still attempting to determine who the certifying or regulatory authority should be
- Receive receipt of a certificate that provides specific number of hours of training received-however, no bearing on individual's competency as a mediator
- In 1992, Supreme Court of Florida was first organization to enact comprehensive guidelines for mediator certification and decertification
 - Parts include mediator qualifications, standards of professional conduct, discipline, complaint committee process and sanctions

- **E. Standards of Conduct**

- Address mediator's activities in a practical sense
- Provide guidance to mediators regarding skill and practice actions as opposed to ethics (moral or right and wrong issues)
- One problem with standards is that there are many stylistic differences in mediators
- Styles:
 - Labor mediation - uses separate meetings to explore minimum settlement positions
 - Therapeutic mediation - usually conducted by one with specific training in the psychotherapeutic or mental health field
 - Legal mediation - focus is on the dispute and by legally trained mediator (focus only on legal solutions as possible outcomes and mediator provide legal analysis)
 - Supervisory mediation - mediator has some inherent authority and may use to decide for parties if don't arrive at own settlement
 - Muscle mediation - mediator strongly urges or coerces parties into accepting a settlement
 - Scrivener mediation - mediator reports thoughts and ideas expressed by others-passive style and relies on abilities of parties to resolve own conflicts
 - Structured mediation - most rigid style used primarily in divorce cases where mediation takes place over period of time
 - Shuttle mediation - separate caucus sessions that are connected by shuttling mediator
 - Crisis mediation - formal mediation used when parties are in the process of disputing
 - Co-mediation - use of two mediators simultaneously-useful where the conflicts are multi-dimensional and require expertise of various types
 - Important that co-mediators do not compete with one another, consult with each other before making important decisions, maintain a unified focus, support each other, and remain flexible
 - Trashing - tearing apart the case and then mediator assists in building the case back with a more realistic settlement figure on the table - resembles a case evaluation

- Bashing - focus on actual settlement offers and bash away at them until the parties agree to a figure somewhere between the two originally proposed
 - Hashing it out - direct communication between the disputing parties encouraged and focus on interests and issues of the parties
- **F. Mediator Liability**
 - **1. Causes of Action**
 - General negligence
 - DTPA
 - Breach of contract
 - Fraud
 - False imprisonment
 - Libel or slander
 - Breach of fiduciary duty
 - Tortious interference with a business relationship
 - Be cautious in advertising and guard against making promises or guarantees
 - Provide all information to parties in writing and design a method to verify what information was received by the parties
 - When not sure, better safe than sorry is the advice
 - **2. Damages**
 - Must be proven
 - Harder to prove if issue concerning mediation process itself
 - Easier to prove if damages involved events which occurred outside mediation
- **G. Immunity**
 - **1. Policy Considerations**
 - Mediator could be considered an extension of the court or judge and provide immunity
 - Many argue that at least volunteers should receive immunity-or they will fear having to expend time and money in defense of malpractice claims
 - Also could argue that many professionals who are also mediators are not provided immunity in their regular profession
 - **2. Statutory Provisions**
 - 19 states provide immunity for mediators including Texas
 - Usually limited to liability of mediators for willful or wanton misconduct
 - **3. Case law**
 - Howard v. Drapkin (mother brought action against psychologist who was hired by both parents to evaluate child's allegations that father had sexually abused, for purposes of custody dispute, alleging professional negligence, intentional infliction of emotional distress, negligent infliction of emotional distress and fraud)
 - **Held:**
 - 1. Psychologist was entitled to common-law immunity as quasi-judicial officer participating in judicial process
 - 2. Psychologist was entitled to statutory privilege for publication in judicial proceeding

- **Wagshal v. Foster** (court appointed arbitration; Wagshal objected to first evaluator based on alleged conflict of interest-new evaluator appointed, D, and against an objection was made based on neutrality and perceived conflict of interest; claim that Wagshal's attitude represented principal impediment to success of the process; third evaluator appointed and case settled)
 - **Held:** D has judicial immunity as court appointed mediator and case against him dismissed
- **H. Quality Mediation Does Not Exist**
 - Critics argue that the traditional legal system has more safeguards for the individual and for society than the mediation process
 - Argue gender discrimination and racial or ethnic prejudices are more likely in mediation

Chapter Sixteen - Specialized Applications of Mediation

- **A. Agricultural Disputes**
 - Between farmers and lenders mainly to provide protection from immediate home loss for the farmer in a foreclosure
 - Required by Agricultural Credit Act of 1997 - requires farmer to be provided legal information and financial advice prior to mediation (this is provided by organization that administers the program)
- **B. Schools and Universities**
 - Student disputes-use student-peers
 - Elementary level to high schools and colleges
 - Administrative concerns
 - Conflicts between administrative departments
 - Conflicts with parents or other interested parties
 - Claims against schools and universities
- **C. Religious Institutions**
 - Construction disputes
 - Inclusion or recognition of gay members
 - Content and efficacy of a religious school program
 - Sexual harassment and indecency with children claims against priests, ministers and rabbis
 - Medical malpractice claims involving church owned hospitals
- **D. Divorce and Family**
 - Divorce
 - Child custody matter
 - Termination of parental rights
 - Establishment of adoption
 - Different because number of issues, many emotions involved and extends over a long period of time
 - Co-mediation is common-lawyer and therapist (sometimes an accountant)
- **E. Employment and Labor**
 - Union or collective bargaining matters
 - Mediator meets with representatives from each group and then is very active in formulating solutions with each representative negotiator

- Many employment agreements provide for mediation of all disputes as a condition of employment
 - Use for wrongful termination claims, age and sexual discrimination claims, claims under Americans with Disabilities Act, sexual harassment disputes, whistle blower claims and disputes involving retaliation for filing workers compensation claims
 - Must consider affect on continued employment
- **F. Public Policy Matters**
 - **1. Generally**
 - Generally within government as well as specific environmental concerns
 - Federal, state and local governments
 - Not private matters if affect great number of individuals
 - Conflicts of whether duty to inform public of decisions made during negotiations
 - **2. Environmental Issues**
 - Effect all individuals-issue are complex and based in large part upon scientific principles
 - Mediators depend on expertise and assistance of engineers
 - Keep in mind that can be very emotional for members of public who are affected-they should have opportunity to participate in mediation
 - Therefore, these are usually lengthy mediations
 - **3. The Federal Sector**
 - Civil Justice Reform Act of 1990 - required each district court to design a cost and delay reduction plan-legislation encourage use of ADR in plan
 - Alternative Dispute Resolution Act of 1998 - mandates that each federal district court establish an ADR program
 - Negotiated Rule-making Act of 1990 specifically urges federal agencies to utilize the reg-neg process in their rule making
 - Determination of:
 - Affected parties
 - Feasibility of process use
 - Notice and meeting
 - **4. State and Local Governments**
 - Encourage same practices as Congress
 - Many states have statewide offices of dispute resolution
- **G. Gay and Lesbian Matters**
 - Mediation processes developed specifically for these issues
 - Primary focus is dissolution of relationship
 - Disputes with individuals who are HIV positive
 - Resources limited, speedy resolution important and often need or desire confidentiality
- **H. Health Care Issues**
 - Disputes over provisions of treatment, cost and payment, and allegations of medical negligence or malpractice
 - Disputes in hospitals - intra-organizational (general employment grievances to matters of physician privileges)
 - Assist in life and death decision making with elderly

- **I. Internet and Cyberspace**
 - o Can use internet to advertise mediation
 - o More common now to conduct actual mediation in chat rooms
 - Speed and convenience are primary benefits
 - Issues of lack of interpersonal dynamics and confidentiality
- **J. Disputes Involving Attorneys**
 - o Mediation of lawyer-client disputes
 - Many disputes result from lack of communication-mediation provides better communication to resolve disputes
 - o Law firm dissolution
- **K. Criminal Arena**
 - o Can mediate prior to prosecution (allegations of criminal activity only)
 - o Some jurisdictions have trained police officers to mediate on the spot when called to a domestic or neighborhood disturbance
 - o Can mediate a plea bargain
 - o Victim-offender mediation focuses on negotiating terms of restitution to be provided to victim by the offender
- **L. Transactional Matters**
 - o Putting together deal, sale or a contract
 - o Negotiation of partnership documents or formation of a corporate entity, a neutral third party mediator can provide structure to the negotiations
- **M. Sports Teams**
 - o Disputes arise between players and between players and coaches
 - o If disputes not dealt with effectively, may adversely affect team morale and performance on the field
 - o Disputes occur when players competing for same position, off-field social disputes, racial divisions or economic lines, and personality disputes
- **N. International and Cross-Cultural Considerations**
 - o Disputes between different nations-must include environmental and economic matters
 - o If security or political issues-usually conducted by outside nation
 - o Cross-cultural mediation - between individuals of different cultures

Chapter Seventeen - Preventative and Creative Uses of Mediation: Derivative, Combined and Hybrid Processes

- **A. Derivative Processes**
 - o **1. Conciliation**
 - Usually used interchangeably with mediation
 - Some say primary difference resides in the role of the neutral
 - Conciliation - neutrality merely brings parties together to discuss matters
 - Mediation - mediator has much more active role
 - Reconciliation between parties is often an integral part of the process
 - o **2. Consensus Building**
 - Similar to mediation - focus on assisting parties in a dispute in reaching a voluntary, mutual, and satisfying agreement
 - Often are many different groups with a variety of interests

- Coalitions form
 - Much intra-group negotiation takes place away from the table
- Used in large public policy disputes
- Not a one time intervention
 - Meets to choose process and then choose protocols
 - Packaging stage - convenor meets in private sessions to determine partial solutions
 - If reach agreement, write up agreement and assist in binding entire group
 - Ratification - meeting participants go back to constituencies and sell agreement so that group's sign off can be obtained
- 3. Reg-Neg
 - Regulatory negotiation
 - Attempt to shorten rulemaking process for federal (as well as state) agencies
 - All interested or affected parties are contacted and invited to take part in the initial design of the rule
 - Discussion continue until all reach consensus about the content of the rule or regulation
 - Third party neutral is called convenor and is responsible for each step in the process
- 4. Convening Conferences
 - Purpose is to select ADR process which will best assist in resolving a given dispute
- B. Combined Processes
 - Med-arb - parties first engage in mediation; if agreement not reached in pre-determined amount of time, the parties enter arbitration
- C. Hybrids
 - Merger of two process-composite
 - Mediation with evaluative process results in mini-trial
 - Use mediation concepts to facilitate communication
 - Then neutral may share her evaluation followed by facilitated discussions
- D. Design Issues
 - Dispute systems design
 - Many organizations try to design, in advance, efficient ways of handling disputes
 - Often mediation is included
 - Dispute resolution has six components:
 - Assessment of current system for dispute resolution
 - Determination of specific goals and objectives of new system
 - Design for the new system
 - Education of users about the new system
 - Actual implementation of new system
 - Evaluation
- E. Conclusion
 - "A mind, once stretched by a new idea, never regains its original shape."
 - Through the mediation process, it is hoped that the minds of mediators, lawyers and disputants are stretched
 - Those involved in mediation process have a unique opportunity to fashion

its future

- It is up to all of us to continue to shape and form the principles and practice of mediation