

# Foreword

*By David A. Hoffman<sup>1</sup>*

I appreciate the invitation to welcome readers to this important and immensely useful book. Before describing some of its major contributions to the theory and practice of mediation advocacy, I think it's worth reflecting on how far we have come since Woody's first book was published by the American Bar Association in 1997—a time when mediation was often viewed askance by lawyers.

I recall a bar association meeting in the mid-1990s in which I was on a panel giving a presentation about mediation. I felt a bit out of my depth because my fellow panelist was one of the major figures of the mediation field, Prof. Frank Sander (my former law school advisor), and I was a mediation newbie. After we had completed our remarks, a young lawyer, looking genuinely puzzled, posed the following question. “Why,” he asked, “would I ever want to refer a new client to mediation?” He went on: “I just finished law school. I just passed the bar. I am struggling to make a living. If I send a new client to mediation, I will be losing money. I don't get it!”

Frank and I just looked at each other for a moment, a bit stunned by the candor and cluelessness of what we had just heard. Then each of us tried to explain, as gently as we could, that (a) lawyers have a fiduciary duty to recommend mediation if that's what would best serve the *client's* interests, and (b) there is an important role for lawyers to play in mediation, either in the mediation itself or “coaching from the sidelines.”<sup>2</sup> We also pointed out that whatever revenues might be lost by recommending mediation in appropriate cases might be more than made up in additional referrals from clients who were more satisfied with mediated outcomes than the outcomes that could be obtained in court.

Fortunately, times have changed, in part because of the efforts of the authors of this book—Woody Mosten, Elizabeth Scully, and Lara Traum—who deserve our appreciation for their leadership and sound advice.

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1. David A. Hoffman is the John H. Watson, Jr. Lecturer on Law at Harvard Law School, where he teaches courses on Mediation; Legal Profession: Collaborative Law; and Diversity and Dispute Resolution. He is also the founding member of Boston Law Collaborative, LLC, where he serves as a mediator, arbitrator, and Collaborative Law attorney.

2. See generally David Hoffman & Karen Tosh, *Coaching from the Sidelines: Effective Advocacy in Divorce Mediation*, 17 MASS. FAM. L.J. 85 (1999), <https://tinyurl.com/hoffman-coaching>.

So, fast forward to 2022, and the questions from lawyers are different. The main question is no longer *whether* lawyers should discuss mediation as an option for their clients, but instead *how*. Today, lawyers are looking for advice about selecting a mediator, preparing clients for mediation, and coaching the clients through the negotiation to a settlement. And this book is where lawyers will find answers to those questions—in abundance, with wise perspectives, examples from cases, and bullet-point practice tips.

One of the important contributions that the authors make in this book is to situate the lawyer's role in mediation as part of the broader movement of “unbundled services”—a movement that Woody launched in the 1990s with pioneering lectures and articles on that subject<sup>3</sup> and the first book on unbundling, published by the American Bar Association.<sup>4</sup>

Building on this critical insight, the authors have added a section on the role of Collaborative Law, which is a form of unbundling—and more generally, commitments by lawyers in connection with the mediation process that they will not litigate the case. By means of this simple commitment, whether formalized in a Collaborative Law participation agreement or simply an engagement letter, lawyers can create more robust support for the mediation process and enhance the parties' confidence that they are each fully committed to the mediation process.

In addition, the authors have included a timely “bonus chapter” by Susan Guthrie on “Representing Clients in Online Mediation,” which by itself is worth the price of admission. This topic is vitally important to lawyers in all settings, but especially in mediation, where videoconferencing runs the risk—if not well managed—of preventing the participants from experiencing the emotional nuances of in-person negotiation and discussion.

Finally, the authors make an important contribution to our field by highlighting the way in which our work is part of a broader mission of peacemaking that is so urgently needed in our world today. Readers of this book will find that the theoretical insights and skills described here are applicable in many other settings. And, in my opinion, it is a particularly wise insight (to be found in Chapter 12) that even litigators—indeed, lawyers of all kinds—can be peacemakers if they bring that orientation to their work: “Peacemaking is not a process, but a set of values, personal attributes, goals, and behaviors that guide and illuminate your work.”

Lawyers have a unique opportunity to contribute to making the world a better place. Learning how to represent and advise clients effectively in mediation can be one of the most powerful contributions of that kind, supporting the efforts of mediators to “bring peace into the room”—a mission that lawyers can share.

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3. See, e.g., Forrest Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421 (1994).

4. Forrest Mosten, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE (2000); FORREST MOSTEN & HON. ELIZABETH POTTER SCULLY, UNBUNDLED LEGAL SERVICES: A FAMILY LAWYER'S GUIDE (2017).