Most lists contain numbers of items that have a traditional context—7, 10, or 20. A list of 12 even has a ring to it. But 11? In mediation, people can customize their process and their agreements. They don’t have to be controlled by a system designed for one size to fit all. We tried to fit the questions into a series of 10, but 11 seemed to work better.

1. If both lawyers are settlement-minded, why should we spend money for yet another professional and hire a mediator?

   If the lawyers can work together and settle the case quickly, amicably, and inexpensively, perhaps mediation is not needed. Quite often, their role as adversary professional causes the other lawyer or party to respond aggressively or to initiate preemptive strikes that the other party finds threatening. It is difficult for you to take care of a client and to play a mediative role at the same time. If lawyers do most if not all of the negotiating, their parties do not experience direct communication with the other party to make their own agreement—which may also improve their future interaction. Using a mediator might be similar to taking out an insurance policy to maintain an amicable situation between all parties and counsel. It also affords the family the benefit of a trained innovative problem solver. Finally, as Baruch Bush and Folger (The Promise of Mediation, 1994), Daniel Bowling and David Hoffman (Bringing Peace into the Room, 2003), and others have argued, the use of mediation can be a transformative experience that may improve the interaction and lives of the family members instead of just putting a settlement Band-Aid on family dysfunction.

2. Isn’t mediation just another form of one attorney having dual representation of two parties with all of the limitations that such conflict situations bring with them?

   It is true that in preventive mediations involved in premarital agreements, adoptions, and putting together a family business, the mediator’s role of putting together and building harmonious relationships seems very much like dual representation. In representing two clients, a single lawyer must withdraw if conflicts appear irreconcilable unless there is a written waiver from all parties. Conflicts, real or apparent, are generally present in virtually all dual representational situations.
As a third-party neutral, the mediator represents neither party. This may be clearer in the mediator’s role of dispute resolver and case manager than it is in preventive mediation. Most mediators and all recognized standards in the field encourage parties in a mediation to consult independent counsel. In many mediations, counsel attend sessions with their clients and participate at the mediation table.

3. Do I have legal malpractice exposure if I sign off on an agreement that is worked out in mediation when I’m not there?

There is malpractice exposure for a lawyer who gives wrong advice or recommends settlement based on inadequate information. It is also true that lawyers who are doing their job to promote settlement never have all of the necessary information. We cut corners all the time. If we didn’t, fewer cases would settle. Transaction costs and litigated conflict can destroy a family—to say nothing of overrunning the courts! The issue isn’t whether corners are cut, but which ones are cut and how important they are. Successful mediation depends on adequate information being disclosed, and an attorney can take numerous strategies in mediation to ensure adequate financial disclosure. Finally, clients who mediate have higher satisfaction with and are more involved in their own divorces, so they are less likely to sue their lawyers.

4. I have spent years learning the law and craft of representing clients. I have seen gross unfairness as a result of untrained and inexperienced mediators, many of whom probably never read a reported decision. Why should I refer another case to mediation? Could I be sued for giving a negligent referral?

If the client is referred to an unqualified mediator, there is an unjust result or process, and the client blames the lawyer for a negligent referral, the lawyer can be sued for professional negligence. However, a failure to disclose appropriate options to litigation can also bring on malpractice and disciplinary exposure. There is a growing movement to assess and certify mediator competency and to expand mediation training programs. However, the lawyer’s obligation is to play a constructive and knowledgeable role in selecting the mediator and to play a proactive role during the process. Turning away clients who want mediation may mean turning down an increasingly growing source of revenue.

5. With all of the economic pressures on my practice, will the growth of mediation cut into my income?

Actually, representing clients in mediation and offering mediation-related services can add new clients and help you improve collections on fees earned. Most family law attorneys do not get paid for approximately 30 percent of the work they perform in litigated matters. Lawyers who use mediation to settle their cases collect over 90 percent of their fees.
6. I have been successfully negotiating settlements for many years and have been to hundreds of settlement conferences. Can I start being a mediator and charge my customary hourly rate?

You can. Currently there is no state regulation of mediation and no requirement for training. However, you might find that you can enrich your mediation craft by taking some training as it is very different from traditional law school education and continuing legal education seminars. You are required to role-play in simulated settings and to participate in other active training that is a far cry from a panel of experts giving lectures. Although there is certainly a demand for lawyer-mediators with substantive knowledge and law practice experience, other effective styles of mediation are being used. Also, there are significant differences in the settlement process between court mandatory settlement conferences and mediation.

7. I can understand sending amicable couples to mediation. But it seems that my entire case roster consists of high-conflict career cases in which I spend so much time in court that I should rent a cot in the courthouse. How can mediation help in these disasters?

Because over 90 percent of cases settle in private mediations, the issue isn’t whether a case will settle, but when, how, and with what transaction costs the settlement will occur. Many jurisdictions now have mandatory mediation on both parenting and economic issues. In litigation horror stories, lawyers are often the victims because of lost stomach lining, unsatisfied clients, and unpaid receivables. A major but less known function of mediators is to provide consensual case management that can put some structure onto such runaway chaos and still give lawyers the freedom of traditional advocacy that judicial case management can take away.

8. I’ve heard that some mediators are charging fees that are higher than mine. There is not enough money in the case to hire yet another lawyer. Can mediators justify their fees when two competent lawyers are already working toward settlement?

Some mediators may overcharge, and others may not produce a process or a result that is worth the expenditure of scarce client resources. However, even with the use of a mediator and independent consulting attorneys, the cost of a mediated divorce is not higher—and may be far lower—than a case directly negotiated between two lawyers. Certainly it is generally lower than litigated divorces. Even co-mediated divorces do not increase fees compared with negotiated divorces. In addition, parties may have the benefits of an interdisciplinary (lawyer-therapist or lawyer-CPA), intergender co-mediation team that often brings settlement faster and more comprehensively compared with working with a sole mediator.
9. I know that mediators should not give legal advice. How can parties make a meaningful agreement if they don’t know the law?

You are correct that a neutral mediator should not give advice—that is, tell the client what to do or what decisions to make. However, mediators differ in the amount of legal information that they provide. Even if a mediator does give legal information (e.g., cases, statutes, tax laws, procedure, support guideline calculations), most clients benefit from individual legal advice and negotiation coaching from an independent family lawyer.

10. I have heard that representing clients who use mediation requires a very different office setup than I currently have. How do I set up a mediation-friendly practice?

First, take the pressure off yourself. Many lawyers who represent parties in mediation do so as a part-time supplement to their law practice. Other lawyers who want to make a career change focusing on mediation do so over a long period of time working from their law office space. A number of tips to setting up a mediation-friendly office can be implemented whether you choose to mediate (full- or part-time) or want to become more active in representing clients in mediation. Marketing in these emerging areas requires a different emphasis and orientation that can also help your existing law practice.

11. I just got my first case to represent a client in a mediation. What do I do?

Assuming that you have had sufficient training, take a deep breath and look forward to a stimulating and satisfying experience. You might want to review some of the resources at the end of this book. Good luck. And remember: it’s probably not as frightening as your first case as a lawyer, and it is the parties’ mediation, not yours. They will probably help you out.