This book is written for lawyers representing clients in mediation. It explains how to use the mediation process, and the special abilities of mediators, to achieve optimal results in settling cases.

Lawyers have traditionally seen mediation as a way to facilitate competitive bargaining over money. In this view a mediator’s primary role is to act as a combination of “telephone” and “boxing glove.” By separating the parties and softening their messages, the mediator allows disputants to use aggressive tactics with less risk. If they reach impasse, as often occurs, the mediator transforms into a quasi-judge, giving an opinion about case value that litigants often treat as a take-it-or-leave-it offer. Many lawyers still see mediation this way, but it does not take advantage of all the process can do.

Mediators have power. They cannot compel anyone to settle, but they can significantly influence the bargaining process. Wise lawyers know how to take advantage of this. As one mediator remarked about a litigator, a note of admiration in his voice, “She moved me around like a chess piece!” Good mediators, however, are not pawns but more like chessboard knights, with capabilities that savvy lawyers can use to advantage.

Mediation enhances a lawyer’s ability to negotiate in many ways. I will give examples throughout this book, but here are a few. A mediator can improve communication by explaining what an offer means (“Tell
them our offer is $25,000, but you can say you have a sense that we’ll talk seriously if they drop their claim to lost profits.”). Mediators can provide information about an opponent’s attitude (“Has the defendant gotten calmer since we met this morning?”) or arrange an informal discussion (“It might be helpful if we set up a meeting between the experts.”).

Advocates can use mediation to pursue either competitive or cooperative strategies. An advocate can make an extreme opening offer, for instance, knowing the neutral will work to “scrape the defendant off the ceiling.” Or a defendant can ask a mediator to explore creative options, such as repairing a ruptured relationship. Lawyers can also pursue a dual strategy, making money offers while asking the neutral to explore business issues.

Toward the end of the process you are likely to find yourself in a threesided negotiation, with both the other side and the mediator. You might bargain, for example, over when the mediator will use a certain technique (“Before you give your own view about liability, I’d appreciate it if you would let us negotiate a little longer”) or how a tactic will be applied (“Why don’t you suggest that the bargaining occur between $400K and $600K?”). You can’t expect a mediator to take your side against another party, but if a tactic is facially neutral and you say it may move the process forward, a mediator will be inclined to try it.

The point is not to approach mediation passively, and instead use the process to advance your clients’ goals. As a mediator I’ve been deployed effectively by good lawyers, and seen other advocates miss opportunities in their cases. This book draws on my experiences to offer suggestions about how to use mediation, and a mediator’s powers, to achieve better outcomes for your clients.

**What is “commercial” mediation?**

This book focuses on “legal” or “commercial” mediation, terms I use interchangeably. Commercial mediation involves disputes in a wide variety of subject areas, ranging from business contracts and personal injuries to patents, software, construction, professional malpractice, environmental pollution, insurance, and other issues.
Commercial mediation has distinctive characteristics. It deals with legal claims, whether filed in court or threatened. Parties are almost always represented by lawyers. And disputants usually hire attorneys only when a matter involves a significant monetary claim. Commercial mediations thus include three basic elements: legal claims, parties represented by lawyers, and large claims for money. (They also involve other important elements, but legal issues and money are what the participants tend to focus on.)

The field of mediation deals with many other kinds of disputes, for instance, marital, neighborhood, victim-offender, international, and public policy controversies. In such disputes mediators often use structures and techniques very different from those described in this book. They are more likely, for example, to work with parties together and to put a heavier focus on repairing relationships and exploring hidden interests. This book, however, focuses on advocacy techniques in typical civil cases.

**Alternative approaches**

The methods I suggest are broader than those favored by many commercial mediators and litigators. Some legal mediators do not talk to lawyers in depth before a mediation, and in many parts of the country mediators do not hold sessions in which parties talk directly with each other at all, both important elements of my approach. Litigators also tend to focus exclusively on legal arguments and monetary claims, while I suggest also exploring emotional barriers to agreement.

Some writers recommend using a broader approach than mine. Gary Friedman and Jack Himmelstein, for example, apply non-caucus, relationship-based techniques to legal disputes, and Harold Abramson counsels lawyers to focus on parties’ interests rather than money bargaining. Each of these approaches has significant value. It is for you to decide what kind of mediator, process, and style of advocacy is best for your case.

I advocate the strategies in this book because I believe them most effective for attorneys and clients. That said, however, you will find that some mediators aren’t comfortable with certain techniques advocated in this book. A mediator should not fault you for asking that a tactic be used, recognizing that you have a very different role in the process. Similarly don’t be annoyed if a mediator declines to use a tactic, because she thinks...
it would not be productive in the circumstances or not consistent with her view of how mediation should be conducted.

**How this book is organized**
For simplicity I will write as if disputes involved only two parties, but some cases have multiple litigants. Where a comment applies primarily to such disputes I note that. The examples I give are from actual cases, but I have changed details to preserve confidentiality.

The book is in four parts:

- Part I describes a basic strategy used by many commercial mediators.
- Part II analyzes how lawyers can take advantage of a mediator’s special abilities.
- Part III explores the techniques most effective at particular stages of mediation.
- Part IV presents a plan to represent a client in the mediation of an actual case and an example of a confidential mediation brief.