This book is based on three key assumptions: First, to represent clients effectively, the next generation of lawyers must be able to mediate effectively. Second, new lawyers are much more likely to encounter mediation as advocates or advisers than as professional neutrals. Finally, textbooks should be interesting to read, bring together the best writing on the process, match well with video, and support interactive teaching.

Our book has a different emphasis than some other texts on mediation. It focuses on legal mediation—substantial disputes involving legal claims, in which lawyers are likely to be engaged. It also looks at mediation from the perspective of a lawyer representing a client as well as the viewpoint of a mediator dealing with conflict.

This book uses examples drawn from actual disputes to illustrate the readings and pique students’ interest. The introductory chapter on mediation, for example, features the comments of practicing lawyers about how they use the process in a variety of settings. It also includes accounts of how two high-profile disputes were mediated, one involving a student death at a university and the other a major antitrust case. The readings on mediation techniques and about ethical issues are also interspersed with provocative examples drawn from actual practice.

The book includes questions designed to provoke critical thinking about the readings and stimulate class discussion. The text is practical, while grounded in theory, and lawyer-focused but enriched by interdisciplinary knowledge. Accompanying role-plays allow students to apply concepts they have read about and bring the text to life. These role-plays again center largely on the types of disputes in which students are likely to find themselves as practicing lawyers—cases with significant legal claims, as opposed to neighborhood or personal conflicts. The Web site contains a comprehensive bibliography to give readers access to writings by scholars in the field.

This is the first mediation book to include video as an integral part of the teaching materials. The Web site provides students with professionally edited video excerpts drawn from the authors’ own work and other sources. Instructors have access to additional video and other materials from a password-protected site they can use to enhance their teaching. The videos show experienced lawyers and neutrals performing in some of the same role-plays featured in the teaching materials, allowing students to see how experienced professionals deal with the challenges they have just faced.

We begin the book with an overview of the disputing universe. It shows that actual legal disputes, unlike the appellate cases that dominate many law school texts, are not neatly packaged, but instead arise as aspects of a near-endless universe of human conflict. Because mediation is a process of assisted negotiation, we next explain the basic concepts of bargaining, analyze choices of style, and present a framework for effective negotiation. Part I of the book concludes with a chapter devoted to the strategic, cognitive, and emotional barriers that often make settlement difficult.
Part II, on mediation technique, begins with examples of mediation in action and goes on to describe styles of commercial mediation that lawyers are likely to encounter, as well as all-caucus and no-caucus approaches. We next examine the process itself in depth, focusing on the methods mediators use to deal with process, emotional/cognitive, and merits-based barriers.

Perhaps the most practical section of the book is Part III, which focuses on how lawyers can represent clients in mediation. This unit is based on our experience conducting commercial and family mediations. Contrary to the image presented in some texts, we begin from the premise that legal mediators commonly do in fact exercise “power.” We treat this as a challenge and an opportunity for lawyers, who can enhance their bargaining effectiveness by drawing on a neutral’s influence. We show how good lawyers can become active participants in mediation, enlisting mediators to overcome barriers to settlement and achieve their clients’ goals.

In Part IV we examine how mediation is applied in different settings, ranging from divorce cases to employment, high tech, and international disputes. We also analyze policy issues, including the impact of mediation on the development of the law and its use in situations where a disputant may be disadvantaged by culture, gender, or spousal violence. A separate chapter delves into ethical issues, presenting situations in which the profession’s model standards come into conflict with each other. We conclude with a look at how mediation may evolve in the future.

This third edition follows the organization of earlier editions. We have updated our narrative and included excerpts from recent writings. We also take advantage of students’ preference for electronic and video formats: Items that have traditionally gone into a paper appendix and bibliography and list of references now appear on the book’s Web site. This makes the book more compact without sacrificing depth, allows readers to download rules and laws for discussion or study, and permits us to update the book as new rules are promulgated. A new feature in the third edition is video of mediation that can be used in teaching.

A note about form: In order to focus discussion and conserve space, we have substantially edited the readings and have deleted most footnotes, references, and case citations. Deletions of material are shown by three dots, but omitted footnotes and other references are not indicated. The footnotes we have retained in excerpts carry their original numbers, while our own footnotes appear with either asterisks or sequential numbering, as appropriate.

This book is the culmination of our combined experience teaching, practicing, and shaping dispute resolution in legal contexts. Although formal acknowledgments follow, we are grateful to the students and lawyers we have had the pleasure of teaching and from whom we have learned a great deal.

January 2016

D.G.

J.F.