CHAPTER 12

PART ONE: ALTERNATIVES TO LITIGATION:

ARBITRATION AND MEDIATION

I. (§12.1.1) INTRODUCTION

II. (§12.1.2) MEDIATION FOR CIVIL CASES

A. (§12.1.3) The Agreement to Mediate.
B. (§12.1.4) Administrative Agencies.
C. (§12.1.5) How To Prepare for a Mediation Session/Discovery.
D. (§12.1.6) The Mediation Session.
E. (§12.1.7) Why Mediation Works.
   1. (§12.1.8) Mediation Brings the Parties to the Bargaining Table.
   2. (§12.1.9) Mediation Educates the Participants.
   3. (§12.1.10) The Mediator can Work Behind the Scenes to Develop a Settlement.
F. (§12.1.11) How to Select Cases to Send to Mediation.
   1. (§12.1.12) It has been three months since the parties discussed settlement; or the case is over 2 years old.
   2. (§12.1.13) The disputants in a case have an ongoing relationship.
   3. (§12.1.14) Your phone calls or letters to the other side go unanswered.
   4. (§12.1.15) You — or the other side — are having client control problems.
   5. (§12.1.16) A lawsuit will soon be filed.
   6. (§12.1.17) The case is in litigation and a substantial round of discovery is coming up.
   7. (§12.1.18) The case is in litigation and it is time to begin preparing for trial.
   8. (§12.1.19) The other side is not furnishing you with the information you need in order to discuss settlement.
   9. (§12.1.20) The case involves a large number of parties, and you are having trouble putting together a comprehensive settlement.
   10. (§12.1.21) The case involves co-defendants or co-plaintiffs who are unable to agree among themselves on settlement possibilities.
   11. (§12.1.22) One party to a case — or their attorney — is driving up everyone’s litigation costs by engaging in unnecessary discovery or procedural maneuvers.
   12. (§12.1.23) You are handling numerous similar cases.
   13. (§12.1.24) Your experience tells you that this case will settle.
   1. (§12.1.26) Is a Mediated Settlement Agreement Legally Binding?
   2. (§12.1.27) Is the Mediation Process Confidential?
   3. (§12.1.28) Does Mediation Toll the Statute of Limitations?
   4. (§12.1.29) Is a Mediation Clause in a Contract Enforceable?
H. Ethical Considerations in Mediation.
   1. (§12.1.30) Good Faith Participation Requirement.
   2. (§12.1.31) Mediator Neutrality.

III. (§12.1.32) MEDIATION FORMS

FORM 1 – CONFIRMATION OF MEDIATION AGREEMENT (AND DISCLOSURE)
FORM 2 - MEDIATION CLAUSE
FORM 3 - SAMPLE MEDIATED SETTLEMENT AGREEMENT (INJURY CASE)

IV. (§12.1.33) ARBITRATION

A. (§12.1.34) Introduction to Private Arbitration.
   1. (§12.1.35) Arbitration is Statutory and Contractual in Nature.
3. (§12.1.37) What Disputes Can Be Arbitrated?

1. (§12.1.39) Initiating the Arbitration Process.
2. (§12.1.40) Role of the Arbitration Organization.
3. (§12.1.41) Appointment of an Arbitrator.
5. (§12.1.43) Failure to Proceed.
6. (§12.1.44) Discovery.

C. (§12.1.46) The Arbitration Award.
1. (§12.1.47) The Award.
2. (§12.1.48) Enforcing the Award.
3. (§12.1.49) Legal Effect of an Arbitration Award.
4. (§12.1.50) Scope of Review.
5. (§12.1.51) Vacation, Modification or Correction of an Award.
6. (§12.1.52) Arbitration Expenses and Attorney Fees.

D. (§12.1.53) Selecting Arbitration.
1. (§12.1.54) Advantages of Arbitration.
2. (§12.1.55) Disadvantages of Arbitration.

V. (§12.1.56) Arbitration Forms

FORM 1 - ARBITRATION AGREEMENT
FORM 2 - SAMPLE ADR CLAUSES
FORM 3 - NOTICE OF INTENT TO ARBITRATE
FORM 4 - RESPONSE TO NOTICE OF INTENT TO ARBITRATE
FORM 5 - GUIDELINES FOR DRAFTING ARBITRATION CLAUSES
FORM 6 - HIGH/LOW ARBITRATION AGREEMENT

PART TWO: MEDIATION OF FAMILY LAW MATTERS
I. MEDIATION OF FAMILY LAW MATTERS
   A. (§12.2.1) MEDIATION — DEFINITIONS.
   B. (§12.2.2) MEDIATION AND THE PARENTING ACT.
   C. (§12.2.3) MEDIATION: HISTORICAL USE AND CULTURAL PREFERENCE.
      1. (§12.2.4) The Promise of Mediation.
         a. (§12.2.5) Harm of the Adversarial Process.
         b. (§12.2.6) Cost.
         c. (§12.2.7) Control.
         d. (§12.2.8) Growth and change.
      2. (§12.2.9) The Perils of Mediation.
         a. (§12.2.9) Mediation assumes trust and is vulnerable to deception by parties or mediators.
         b. (§12.2.10) Psychologically abused clients often deny their abuse.
         c. (§12.2.11) Some mediators lack proper background and experience.
   II. (§12.2.12) THE OBJECTIVES & PRINCIPLES OF MEDIATION.
      A. (§12.2.13) OBJECTIVES.
      B. (§12.2.14) PRINCIPLES OF MEDIATION.
   III. (§12.2.15) THE MEDIATION PROCESS
      A. (§12.2.16) NO SINGLE METHOD.
      B. (§12.2.17) INTAKE AGREEMENT.
         1. (§12.2.18) Confidentiality.
         2. (§12.2.19) Communication.
         3. (§12.2.20) Representation & Ethics.
         4. (§12.2.21) Fees, Suspension & Termination.
      C. (§12.2.22) MEDIATION PROCESS — ASSESSMENT & ISSUES.
         1. (§12.2.23) Issue Assessment.
         2. (§12.2.24) Power Assessment.
         5. (§12.2.27) Reassess the Remaining Problems and Repeat Steps 1-4.
      D. (§12.2.28) THE GOALS OF MEDIATION — THE THREE SATISFACTIONS.
         1. (§12.2.29) Economic Satisfaction.
         2. (§12.2.30) Psychological Satisfaction.
         3. (§12.2.31) Legal Satisfaction.
      E. (§12.2.32) MEDIATOR’S ROLE IN DRAFTING FINAL AGREEMENTS.
   IV. (§12.2.33) PREPARING YOUR CLIENT FOR MEDIATION
      A. (12.2.34) ASSESSING COUPLE CONFLICT TYPES.
         1. (§12.2.35) The Enmeshed Couple.
         3. (§12.2.37) The Direct Conflict Couple.
         4. (§12.2.38) The Disengaged Conflict Couple.
      B. (§12.2.39) ASSESSING CLIENT CAPACITY TO MEDIATE.
      C. (§12.2.40) FINDING A MEDIATOR FOR YOUR CLIENT.
      D. (§12.2.41) MEDIATOR SKILL AND COMPETENCIES — AN ASSESSMENT.
         FORM 1: AUGUST 2005 ABA MODEL STANDARDS OF CONDUCT FOR MEDIATORS
         FORM 2: RCW 7.07, WASHINGTON UNIFORM MEDIATION ACT
         FORM 3: MODEL MEDIATION AGREEMENT
   PART THREE: MEDIATION OF ENVIRONMENTAL AND TOXIC TORT CLAIMS
   I. (§12.3.1) INTRODUCTION
II. (§12.3.2) DEFINITION OF ENVIRONMENTAL AND TOXIC TORT LITIGATION

III. (§12.3.3) WHY MEDIATION IS EFFECTIVE IN ACHIEVING SETTLEMENT OF ENVIRONMENTAL AND TOXIC TORT CASES

IV. (§12.3.4) PREPARING AND CONDUCTING MEDIATIONS

V. (§12.3.5) CONCLUSION