Mediation and Negotiation: Reaching Agreement in Law and Business

Second Edition

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Mediation and Negotiation: Reaching Agreement in Law and Business

Second Edition

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DEDICATION

To Our Children: Jennifer and Robert

In Memory of: Penelope Daniels Pearson

PREFACE

The best thing about the second edition of any book is that there is sufficient felt need and demand for the work to warrant a second, and updated, version thereof. When we started work on the first edition, many scoffed that there was little to write about in this "emerging" field. As many others have recognized in the decade since our last edition, there is much to write and think about in the dispute resolution field. The changes since the turn of the century are extensive, as nearly all courts of larger metropolitan areas have adopted one or more forms of dispute resolution in their case management activities. We also see more recognition that the most important business skill one can possess today is the ability to negotiate effectively. Even though this skill is recognized as a core competency, we see course offerings as spotty at best in our business and law curricula. The root word for negotiation is to carry on business and those who speak Spanish recognize the similarity for the word for business: *negocio*.

Our perspective is one of an academic-practitioner and a practitioner-academic. We bring practical lessons to intense theoretical concepts. We consider business and legal education. We believe that excellence in dispute resolution requires a thorough grounding in both theory and practice, with each deepening an understanding of the other. In terms of course structure, the theory is found largely in the readings, while most classes are devoted to practice — and how it is informed by theory.

The subject matter of these teaching materials is consensual dispute resolution processes, predominantly mediation and negotiation. We examine most of the processes and issues associated with what is commonly called alternative dispute resolution (ADR). The major omission from the ADR canon is arbitration, although we do provide brief consideration of binding private arbitration (in Chapter 11) and court-annexed arbitration (in Chapter Ten). Arbitration has become such an important topic that it has become a separate course. See Stephen K. Huber & Maureen A. Weston, ARBITRATION: CASES AND MATERIALS (2d. ed. 2006).

These materials focus on business transactions, defined broadly to include employment and consumer disputes. The only important exceptions are two forays into criminal law. Plea bargaining is examined in Chapter Six as an important example of negotiation, and victim-offender mediation (VOM) is discussed in Chapter Nine as an interesting use of mediation. Criminal matters present uniquely difficult challenges, and thus present an excellent basis for thinking about negotiation and mediation. The central omission, compared to other books about dispute resolution, is the total exclusion of family matters, notably divorce and child custody.

This book can be used for a variety of courses including Introduction to ADR, Negotiation, Mediation, Mediation Advocacy, and Mediation & Negotiation.

We combine negotiation and mediation in a single book because mediation is simply, albeit importantly, facilitated negotiation. These materials are designed for use in graduate level courses in law schools, business schools, and the social sciences. However, we have also used these materials to teach dispute resolution to undergraduate students at Rice University, which leads us to conclude that strong college students are capable of handling this challenging subject matter. Our thoughts and specific suggestions for using these materials for teaching each of these different audiences are found in the accompanying Teacher's Manual.

These materials include a relatively large number of cases compared to other ADR materials, but fewer cases than are typical for law school courses (and also law courses taught elsewhere in a graduate school setting). There are ample cases for teachers who want to undertake serious case analysis, although this is not recommended for law school courses due to the extensive focuses on judicial decisions in other courses.

Many of the authors whose works appear in this book have strong views on dispute resolution issues, and no effort is made to hide them. Indeed, many of the pieces presented here were selected precisely because they represent diverse points of view. We have exercised due diligence and "best efforts" to present works that are serious and accurate, but the reader must also remember that the authors often are advocates for particular positions.

This book is divided into five Parts and sixteen Chapters, which we briefly outline here. Further detail is found in the opening section of each chapter. Part I (Chapters One to Three) introduces the subject matter of the course, and examines dispute resolution generally. The focus of these chapters is alternative dispute resolution (ADR), but it is important to recognize that judicial trials are one of the many alternative ways to resolve disputes. In Chapter One we introduce the array of approaches to disputes. Then we turn to the modern ADR movement, and offer several different perspectives on public and private approaches to addressing disputes.

Chapter Two is devoted to communications, both the theory and the practice. Effective communication is a core competence for effective interactions with others, and particularly for reaching agreements and resolving disputes. Our experience is that while a few students learned quite a bit about communications theory and psychology in college, many other students learned almost nothing about this topic. The readings provide the theory, and "hands on" exercises provide the practice.

Chapter Three explores the contributions of various social sciences to thinking about disputes and disputing processes. These include rational choice (economics), game theory, psychology, agency theory and anthropology. Particular attention is given to two important models of behavior: the Tragedy of the Commons and the Prisoner's Dilemma.

Part II (Chapters Four to Six) introduces negotiation, the core dispute resolution process. Chapter Four offers several models of negotiation, followed by a consideration of strategies for successful negotiation and important factors that impact the negotiation process. The theory is presented in the readings, and should be supplemented with negotiation exercises that allow for the practical application of negotiation principles. Chapter Five is devoted to trans-national and cross-cultural considerations in negotiation. At the trans-national level, we focus on negotiation in Japan, and examine the clash of American and Japanese attitudes and approaches to negotiation. There are also many cultures within a nation, and cultural factors have an important impact on negotiations among people from the same culture or community.

Chapter Six is devoted to negotiation applications. Two major areas are considered in depth: commercial (including consumer) transactions, and plea bargaining in criminal cases. Business transactions are the central focus of these materials, while plea bargaining might be regarded as the single most important negotiation context because nothing less than the liberty of the subject is at issue. The legislation process is considered here because the dance of legislation can be viewed as a collection of negotiations. Finally, we examine negotiation conduct of questionable integrity — a category that ranges from lying, through dishonesty to misrepresentation are commonly employed. We consider concerns about fairness in negotiation when the endowments of the parties, measured by power, wealth, education and similar factors, are significantly different. Of course, these factors are also applicable, *mutatis mutandis*, to other disputing processes.

Part III is composed of three chapters devoted to mediation — facilitated negotiation. Chapter Seven commences with mediation theory and then turns to mediation practice. Once again, the use of participatory exercises is essential to understanding the mediation process. In Chapter Eight, we consider several important mediation topics. The first is the law of mediation — and, ironically, there turns out to be a considerable amount of relevant law. Perhaps the defining characteristic of mediated processes is that the parties disclose information in confidence to the mediator (or other third party neutral). Confidentiality is much discussed in legislation, notably the Uniform Mediation Act, academic commentary, and case law. The next major topic is mediation advocacy — what it is and when advocacy is appropriate in mediation. Good faith participation in mediation is considered in Chapter Eleven, because the good faith participation most commonly arises in the context of court-connected mediation.

Chapter Nine is devoted to mediation applications. From the many possibilities, we selected three arenas where mediation plays an important role. Mediation in the medical setting encompasses a variety to topics, from insurance coverage disputes to bioethics issues to malpractice claims. Huge sums of money are involved, and the number of disputes is vast, so mediation will continue to have a central role in the resolution of medical care disputes. The next topic is Victim Offender Mediation (VOM). Attempting to reconcile victims and offend-

ers of criminal action offers an extremely difficult challenge for mediation and mediators, which makes an examination of VOM particularly interesting and important. The final topic, mediators as business deal makers, is more speculative than those just mentioned, because mediators are not commonly retained to facilitate business transactions. However, if mediation really can bring value to parties in disputes with one another, it seems they should be able to add value in assisting willing parties in reaching mutually beneficial deals.

Chapters One to Nine constitute the core of the course, because they thoroughly cover negotiation and mediation. Much of what follows might be regarded as variants on already established themes. In Part IV (Chapters Ten to Fourteen), we examine additional ADR processes and procedures that involve the use of a third party neutral. Chapter Ten considers court-connected ADR processes. Absent contrary agreement by the parties, these processes are necessarily consensual. While courts cannot require litigants to reach an agreement, they generally can require parties to participate in (and pay for) mediation or some other settlement process. Although mediation is the most common court-connected settlement process, we here focus our attention on three other approaches: early neutral evaluation (ENE), summary jury trial (SJT), and (non-binding) arbitration.

Assuming that a court can require parties to participate in an ADR process, there remains the question of what level of participation may be required — sometimes referred to as a requirement of good faith participation. Put another way, can a party be required to do any more than show up and listen? — while adopting a settlement position of millions for defense but not one cent for tribute? Special considerations may apply when the party is the government rather than a private party. We close the chapter with mediation at the appellate court level. Because the parameters of the dispute have been defined and narrowed by the trial court decision, mediation at the behest of an appellate tribunal is often successful.

In Chapter Eleven we turn to private ADR processes other than mediation. We start with the mini-trial, which calls for the participation of senior executives in business disputes. Then we turn to an extensive examination of private binding arbitration. Arbitration is sweeping the American legal landscape as a form of binding dispute resolution, but that subject is largely beyond the scope of this course. Collaborative law, in which settlement counsel agree in advance not to serve as litigation counsel if the dispute cannot be settled, is the newest star in the dispute resolution firmament. Heretofore, collaborative law has been largely limited to family law disputes, but this approach could readily be extended to other types of disputes. The Ombudsman originally was a Swedish official who assisted persons who had problems in their who had dealings with the government. In America, ombuds have spread from the public to the private sector, and this approach is now widely used in businesses and universities. Partnering and dispute review boards are widely used for large dollar construction projects.

Chapter Twelve considers the many ways in which ADR is employed by the government, which means the Executive Branch (which executes the laws enacted by the legislature). The Administrative Dispute Resolution Act (1990, as amended in 1996) committed the executive branch, under the leadership of the Department of Justice, to comprehensive reliance on ADR in addressing present and potential disputes. Today the federal government is a leader in using ADR for all manner of disputes, both large and small. There are also numerous initiatives at the state and local government level, but it is difficult to generalize about them. A useful exercise is to have students search for and report on local examples of government ADR.

Specific examples of government use of ADR are numerous, and we limit our discussion to a few examples. One instance is the process used by the Department of Justice to address claims arising under the Federal Tort Claims Act (FTCA). Farmer-Lender mediation illustrates the joint dispute resolution activities of federal and state agencies. The Internal Revenue Service has utilized ADR for many decades — long before anyone used the term ADR. Finally, we consider Negotiated Rulemaking — popularly known as "Reg-Neg" — a process in which all the groups interested in a federal rulemaking seek to negotiate an agreement that all can live with. The agency is not required to adopt the result of a reg-neg proceeding, but agencies usually do so, and that result commonly is not subject to judicial challenge.

Chapter Thirteen examines the law, policy, and practice related to the settlement of disputes. This might seem to be a strange topic in the midst of a book devoted to the settlement of disputes. The central goal is to critically examine the values of settlement, and whether compromise is always the best approach. We also examine contemporary settlement practices. Although trials (often with the use of a jury) are central to the law school experience and television shows about law, in fact most cases settle (and most disputes settle without ever becoming cases). We close the chapter with an examination of the quite considerable body of law related to the enforcement of purported settlement agreements.

Chapter Fourteen considers the impact of the technology revolution on the nature of disputing, and the manner in which disputes are processed in our brave new world of instant communication. Both of your authors are over 40, and we are less comfortable making use of the modern tools for exchanging information than are our children, but it is clear that the manner in which disputing parties interact with one another will change dramatically over time, and ever fewer interactions will take the form of a single face-to-face, in person meeting. We are confident that dispute resolution, and the lives of dispute resolution professionals, will change dramatically during the 21st century, even if we are presently unable to predict the nature and extent of these changes in any detail.

In Part V (Chapters Fifteen and Sixteen), the focus shifts from disputing processes to dispute resolution professionals. Chapter Fifteen considers quali-

fications for dispute resolution professionals, as well as potential errors and omissions liability ("malpractice" is such an ugly word). Fortunately for mediators, professional liability is an entirely theoretical concern, and even if a basis for liability was found the measure of damages would be modest. With the increasing importance of mediation, and more persons devoting a considerable portion of their professional careers to mediating, there has arisen a movement for credentialing (mandatory or voluntary) of mediators. There is considerable fear regarding this approach by many dispute resolution practitioners, who regard credentialing as a strategy by attorneys to exclude others from (paying) mediation practice.

Chapter Sixteen addresses planning for and avoiding disputes, a process that often goes by the name of systems design. Good business and commercial planners think about potential disputes before they happen, and make plans so that they never happen — or, if a dispute does arise, its impact will be minimal. Such planning, accompanied by staff training, is an attractive option in the workplace because employers and employees are engaged in a common enterprise on a long term basis. We offer several examples of dispute resolution planning in several employment contexts. Finally, we offer three examples of planning for and managing conflict: construction bid protest processes; implementing ADR in the Coast Guard; and health care.

The Teacher's Manual presents exercises, problems, and role plays, along with suggestions about their use to further pedagogical goals. It also includes further guidance on the use of these materials, confidential facts for participants in role plays, and additional "hands on" exercises and problems. Most of the textual material can be understood by graduate students without extensive classroom discussion; in teaching these materials we devote much class time to dispute resolution exercises, followed by debriefing and discussion.

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Few observations are truly original, and most of what we know represents the ideas of others, or at least is based on what we hear and read. We cannot do better than to borrow from Rudyard Kipling, who limned the class acknowledgment of the obligation of authors to the work of others.

When 'Omer Smote 'is Bloomin Lyre

When 'Omer smote 'is bloomin lyre,
He'd 'eard men sing by land an' sea;
An' what he thought 'e might require,
'E went an' took — the same as me!

The market girls an' fisherman,
The shepards an' the sailors too,
They 'eard old songs turn up again,
But kept it quiet — same as you!

They knew 'e stole; 'e knew they knowed.
They didn't tell, or make a fuss,
But winked at 'Omer down the road,
An' 'e winked back — the same as us!

Strikingly, Kipling chose this poem, rather than his much more famous *Recessional*, as the final piece in his collected poems.

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