

**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

E. WENDY TRACHTE-HUBER

*Principal
Trachte-Huber Consulting*

STEPHEN K. HUBER

*Foundation Professor of Law
University of Houston Law Center*



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201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
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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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TABLE OF CONTENTS

Preface	v
Acknowledgments	xi

Part I

ADDRESSING DISPUTES: GENERAL CONSIDERATIONS

Chapter 1: AN OVERVIEW OF DISPUTE RESOLUTION	3
A. INTRODUCTION	3
B. THE ARRAY OF DISPUTE RESOLUTION PROCESSES	4
1. The Dispute Resolution Continuum	4
2. Core Consensual Dispute Resolution Processes: Negotiation and Mediation	4
3. Dispute Resolution Processes	5
C. THE MODERN ADR MOVEMENT: ALTERNATIVE TO WHAT? ..	6
1. Modern Origins: The 1976 Pound Conference	6
2. Jay Tidmarsh, <i>Pound's Century and Ours</i> , 81 NOTRE DAME L. REV. 513 (2006)	6
3. Frank E.A. Sander, <i>Varieties of Dispute Processing</i> , 70 F.R.D. 111 (1975)	7
4. To What Is ADR the Alternative?	9
5. Jethro K. Lieberman & James F. Henry, <i>Lessons From the Alternative Dispute Resolution Movement</i> , 53 U. CHI. L. REV. 424 (1986)	10
6. William Twining, <i>Alternatives to What? Theories of Litigation, Procedure and Dispute Settlement in Anglo-American Jurisprudence: Some Neglected Classics</i> , 56 MOD. L. REV. 380, 380-83 (1993)	12
D. MAKING USE OF ADR: PICKING A PROCESS	15
1. Comments and Questions	15
2. Frank E.A. Sander & Lukasz Rozdeiczer, <i>Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach</i> , 11 HARV. NEGOT. L. REV. 1 (2006)	15
3. Phillip M. Armstrong, <i>Georgia-Pacific's ADR Program: A Critical Review After 10 Years</i> , 60-JUL DISP. RESOL. J. 19 (2005)	25
E. THINKING ABOUT THE ALTERNATIVES	29
1. Comments and Questions	29
2. Harry T. Edwards, <i>Alternative Dispute Resolution: Panacea or Anathema?</i> , 99 HARV. L. REV. 668 (1986)	30
3. Judith Resnik, <i>Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication</i> , 10 OHIO ST. J. ON DISP. RESOL. 211 (1995)	35

Chapter 2: COMMUNICATIONS: THEORY AND PRACTICE	43
A. INTRODUCTION	43
B. LISTENING SKILLS AND EFFECTIVE COMMUNICATIONS . . .	44
1. Communication as an Interactive Process	44
2. EASTWOOD ATWATER, I HEAR YOU 1-3, 165-174 (1992)	45
3. DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, LAWYERS AS COUNSELORS (1991)	46
4. Comments and Questions	56
C. CONTEXT OF COMMUNICATIONS	57
1. Comments and Questions	57
2. FRANZ LIEBER, LEGAL AND POLITICAL HERMENEUTICS 17-19 (3d ed. 1880)	57
3. <i>Frigalimint Importing Co., Ltd. v. B.N.S. Int'l Sales Corp.</i> , 190 F. Supp. 116 (1960)	58
4. Comments and Questions	62
D. THE MANAGEMENT OF IMPRESSIONS: "ALL THE WORLD'S A STAGE"	62
1. Comments and Questions	62
2. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 1-8 (1959)	63
3. JEAN PAUL SARTRE, BEING AND NOTHINGNESS 59 (1956) [The Waiter]	64
4. WILLIAM SANSOM, A CONTEST OF LADIES 230-32 (1956)	65
5. Comments and Questions	65
6. GEORGE SANTAYANA, SOLILOQUIES IN ENGLAND AND LATER SOLILOQUIES 131-132 (1992)	66
E. WOMEN AS NEGOTIATORS	67
1. KATHLEEN KELLEY REARDON, THEY DON'T GET IT, DO THEY? COMMUNICATION IN THE WORKPLACE — CLOSING THE GAP BETWEEN MEN AND WOMEN 40-45 (1995)	67
2. Comments and Questions	68
3. Professor Charles Craver's Research on Gender Differences in Negotiation	69
 Chapter 3: THEORETICAL APPROACHES TO DISPUTES AND DISPUTING	 71
A. INTRODUCTION	71
B. RATIONAL CHOICE THEORY AND ITS CRITICS	72
1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 118-19 (1776) (Penguin 1986)	72
2. Comments and Questions	73
3. Christine Jolls, Cass R. Sunstein & Richard Thaler, <i>A Behavioral Approach to Law and Economics</i> , 50 STAN. L. REV. 1471 (1998)	73
4. Robert S. Adler, <i>Flawed Thinking: Addressing Decision Biases in Negotiation</i> , 20 OHIO ST. J. ON DISP. RESOL. 683 (2005)	79

TABLE OF CONTENTS

xxiii

C. GAMES PEOPLE PLAY: REAL AND THEORETICAL	88
1. The Theory of Games and the Game of Negotiation	88
2. The Prisoner's Dilemma	90
3. The Tragedy of the Commons	91
4. Comments and Questions	92
D. MAKING CONCESSIONS AND ADJUSTING TO CHANGE	93
1. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1-6, 2 61-67 (1957)	93
2. Comments and Questions	94
3. Barry M. Staw, <i>The Escalation of Commitment to a Course of Action</i> , ACAD. MGMT. REV., October 1981, at 577	95
E. AGENCY THEORY	99
1. Comments and Questions	99
2. Ronald J. Gilson & Robert H. Mnookin, <i>Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation</i> , 94 COLUM. L. REV. 509 (1994)	100
3. Collaborative Law: An Answer to the Risks of Cooperation	112
F. ANTHROPOLOGY AND SOCIOLOGY	113
1. Sally Engle Merry, <i>Disputing Without Culture: Review of Stephen B. Goldberg, Eric D. Green & Frank E.A. Sander, Dispute Resolution</i> (1985), 100 HARV. L. REV. 2057 (1987)	113
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3. Comments and Questions	116
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5. KARL N. LLEWELLYN & E. ADAMSON HOEBEL, <i>THE CHEYENNE WAY</i> 20-22 (1941)	118

**Part II
NEGOTIATION**

Chapter 4: THE NEGOTIATION PROCESS	123
A. INTRODUCTION	123
B. MODELS OF NEGOTIATION	124
1. Observing and Thinking About Negotiation in Daily Life	124
2. P. H. GULLIVER, <i>NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE</i> 79-80 (1979)	125
3. John S. Murray, <i>Understanding Competing Theories of Negotiation</i> , 1986 NEGOT. J. 179	126
4. Comments and Questions	127

5. Carrie Menkel-Meadow, <i>Toward Another View of Legal Negotiation: The Structure of Problem Solving</i> , 31 UCLA L. REV. 754, 760-62 (1984)	128
6. Charles B. Craver, <i>The Negotiation Process</i> , 27 AM. J. TRIAL ADVOC. 271 (2003)	129
C. THE UNDERLYING LEGAL CONTEXT	134
1. "Bargaining in the Shadow of the Law"	134
2. Russell Korobkin, Michael Moffitt & Nancy Welsh, <i>The Law of Bargaining</i> , 87 MARQ. L. REV. 839 (2004)	134
D. THE NEGOTIATION PROCESS: STRATEGIES FOR SUCCESS	139
1. WILLIAM R. POTAPCHUK ET AL., <i>GETTING TO THE TABLE: A GUIDE FOR SENIOR MANAGERS</i> (1990), U.S. Army Corps of Engineers Working Paper No. 3 [IWR Working Paper 90-ADR-WP-3]	139
2. Implicit Negotiations Ancillary to the Main Negotiation	142
3. David A. Lax & James K. Sebenius, <i>Interests: The Measure of Negotiation</i> , 2 NEGOT. J. 73 (1986)	143
4. Donald G. Gifford, <i>A Context-Based Theory of Strategy Selection in Legal Negotiation</i> , 46 OHIO ST. L.J. 41, 45-58 (1985)	145
5. Comments and Questions	152
6. James J. White, <i>Review Essay: The Pros and Cons of "Getting to YES" by Roger Fisher & William Ury</i> , 31 J. LEGAL EDUC. 115 (1981)	152
7. ROGER FISHER, <i>Comment on James White's Review of "Getting to YES,"</i> 31 J. LEGAL EDUC. 128 (1981)	156
E. FACTORS AFFECTING NEGOTIATION	159
1. Comments and Questions	159
2. Charles B. Craver, <i>Negotiation Styles: The Impact on Bargaining Transactions</i> , 58-APR DISP. RESOL. J. 48 (2003)	159
3. Jennifer Gerarda Brown, <i>Creativity and Problem-Solving</i> , 87 MARQ. L. REV. 697 (2004)	162
4. Nancy A. Welsh, <i>Perceptions of Fairness in Negotiation</i> , 87 MARQ. L. REV. 753 (2004)	166
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Chapter 5: TRANS-NATIONAL AND CROSS-CULTURAL PERSPECTIVES	177
A. INTRODUCTION	177
B. HOW DO MINORITIES AND "HAVE-NOTS" FARE IN ADR?	178

TABLE OF CONTENTS

xxv

1. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, <i>Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution</i> , 1985 WIS. L. REV. 1359	178
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3. Comments and Questions	195
C. DISPUTE SETTLEMENT WITHIN CLOSELY KNIT COMMUNITIES	196
1. Comments and Questions	196
2. JEROLD AUERBACH, <i>JUSTICE WITHOUT LAW?</i> 3 (1981)	197
3. Diane LeResche, <i>A Comparison of the American Mediation Process With a Korean-American Harmony Restoration Process</i> , 9 MEDIATION Q. 323 (1992)	197
D. NEGOTIATING IN JAPAN: A PRIMER FOR AMERICANS	205
1. Comments and Questions	205
2. GLEN FISHER, <i>INTERNATIONAL NEGOTIATION: A CROSS-CULTURAL PERSPECTIVE</i> (1980)	205
3. DEAN ALLEN FOSTER, <i>BARGAINING ACROSS BORDERS: HOW TO NEGOTIATE BUSINESS ANYWHERE IN THE WORLD</i> 264-93 (1992)	206
4. ROBERT M. MARCH, <i>THE JAPANESE NEGOTIATOR: SUBTLETY AND STRATEGY BEYOND WESTERN LOGIC</i> 15-17 (1990)	208
5. SANJYOT P. DUNUNG, <i>DOING BUSINESS IN ASIA: THE COMPLETE GUIDE</i> (1995)	209
6. BOYE LAFAYETTE DEMENTE, <i>HOW TO DO BUSINESS WITH THE JAPANESE: A COMPLETE GUIDE TO JAPANESE CUSTOMS AND BUSINESS PRACTICES</i> (1993)	210
7. PHILIP R. HARRIS & ROBERT I. MORAN, <i>MANAGING CULTURAL DIFFERENCE</i> (1991)	211
8. JAMES DAY HODGSON, YOSHIHIRO SANO & JOHN L. GRAHAM, <i>DOING BUSINESS WITH THE NEW JAPAN</i> 33-46 (2000)	212
Chapter 6: NEGOTIATION APPLICATIONS	221
A. INTRODUCTION	221
B. COMMERCIAL (INCLUDING CONSUMER) TRANSACTIONS	222
1. Arthur Allen Leff, <i>Injury, Ignorance and Spite: The Dynamics of Coercive Collection</i> , 80 YALE L.J. 1, 25-26 (1970)	222
2. Comments and Questions	223
3. G. RICHARD SHELL, <i>BARGAINING FOR ADVANTAGE</i> 138-44 (1999)	225
4. SHIVA NAIPAUL, <i>NORTH OF SOUTH: AN AFRICAN JOURNEY</i> 47-52 (1978)	228
6. Comments and Questions	230
C. NEGOTIATION IN LEGISLATIVE BODIES	231
1. Tom Melling, <i>Dispute Resolution Within Legislative Institutions</i> , 46 STAN. L. REV. 1677 (1994)	231

2. Comments and Questions	238
D. PEOPLE ACCUSED OF CRIMES: PLEA BARGAINING	238
1. Comments and Questions	238
2. Abraham S. Blumberg, <i>The Practice of Law as a Confidence Game</i> , 1 LAW & SOC'Y REV. 15 (1967)	239
3. Donald G. Gifford, <i>A Context-Based Theory of Strategy Selection</i> , 46 OHIO ST. L.J. 41, 73-82 (1985)	245
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5. Stephanos Bibas, <i>Plea Bargaining Outside the Shadow of Trial</i> , 117 HARV. L. REV. 2463 (2004)	251
E. QUESTIONABLE NEGOTIATION CONDUCT: PUFFING, MISREPRESENTATION, AND LYING	256
1. Comments and Questions	256
2. Charles B. Craver, <i>Negotiation Ethics: How to Be Deceptive Without Being Dishonest; How to Be Assertive Without Being Offensive</i> , 38 S. TEX. L. REV. 713 (1997)	256
3. James J. White, <i>Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation</i> , 1980 ABA RES. J. 921	264
4. John W. Cooley, <i>Defining the Ethical Limits of Acceptable Deception in Mediation</i> , 4 PEPP. DISP. RESOL. L.J. 263 (2004)	267
5. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, Formal Opinion 06-347 (2006)	276

Part III MEDIATION

Chapter 7: THE MEDIATION PROCESS	281
A. INTRODUCTION	281
B. THE MEDIATION PROCESS: THEORY	282
1. Comments and Questions	282
2. Lon L. Fuller, <i>Mediation — Its Forms and Functions</i> , 44 S. CAL. REV. 305 (1970)	283
3. Christopher W. Moore, <i>MEDIATION 1-7, 10-16</i> (U.S. Army Corps of Engineers 1991)	294
C. THE MEDIATION PROCESS: PRACTICE	302
1. Comments and Questions	302
2. Eric Galton, <i>REPRESENTING CLIENTS IN MEDIATION 25-53, 104-12</i> (1995)	303
3. Tom Arnold, <i>Twenty Common Errors in Mediation Advocacy</i> , ADR TODAY, Spring 1995, at 2.	316
4. James J. Alfini, <i>Trashing, Bashing, and Hashing It Out: Is this the End of "Good Mediation?"</i> 19 FLA. ST. U. L. REV. 47, 66-73 (1991)	321

TABLE OF CONTENTS

xxvii

D. DIFFERENT VIEWS OF MEDIATION: HOW TO DEFINE SUCCESS?	322
1. Comments and Questions	322
2. ROBERT BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 15-27 (1994)	322
3. Michael L. Moffitt, <i>Schmediation and the Dimensions of Definition</i> , 10 HARV. NEGOT. L. REV. 69 (2005)	327
Chapter 8: MAJOR MEDIATION MATTERS	335
A. INTRODUCTION	335
B. MEDIATION IN THE COURTS: THE LAW OF MEDIATION	336
1. Comments and Questions	336
2. James R. Coben & Peter N. Thompson, <i>Disputing Irony: A Systematic Look at Litigation About Mediation</i> , 11 HARV. NEGOT. L. REV. 43 (2006)	336
C. CONFIDENTIALITY	342
1. Comments and Questions	342
2. Carol L. Izumi & Homer C. La Rue, <i>Prohibiting “Good Faith” Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent</i> , 2003 J. DISP. RESOL. 67 (2003)	343
3. <i>National Labor Relations Board v. Joseph Macaluso, Inc.</i> , 618 F.2d 51 (9th Cir. 1980)	343
4. <i>In re Anonymous</i> , 283 F.3d 627 (4th Cir. 2002)	346
5. <i>Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.</i> , 332 F.3d 976 (6th Cir. 2003)	352
6. <i>Foxgate Homeowners’ Ass’n, Inc. v. Bramalea Cal., Inc.</i> , 25 P.3d 1117, 1126 (Cal. 2001)	353
7. Comments and Questions	361
8. <i>State v. Williams</i> , 877 A.2d 1258 (N.J. 2005)	362
D. MEDIATION ADVOCACY	367
1. Comments and Questions	367
2. Peter Robinson, <i>Contending With Wolves in Sheep’s Clothing: A Cautiously Cooperative Approach to Mediation Advocacy</i> , 50 BAYLOR L. REV. 963 (1998)	368
3. James K.L. Lawrence, <i>Mediation Advocacy: Partnering With the Mediator</i> , 15 OHIO ST. J. ON DISP. RESOL. 425 (2000)	376
4. Jean R. Sternlight, <i>Lawyers’ Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting</i> , 14 OHIO ST. J. ON DISP. RESOL. 269 (1999)	378
5. Harold Abramson, <i>Problem-Solving Advocacy in Mediations: A Model of Client Representation</i> , 10 HARV. NEGOT. L. REV. 103 (2005)	380
E. GOOD FAITH PARTICIPATION IN MEDIATION	384

Chapter 9: MEDIATION APPLICATIONS	385
A. INTRODUCTION	385
B. MEDIATION IN THE MEDICAL SETTING	385
1. Comments and Questions	385
2. Nancy Neveloff Dubler, <i>Mediating Disputes in Managed Care: Resolving Conflicts Over Covered Services</i> , 2002 J. HEALTH CARE L. & POL'Y 479	386
3. Phyllis E. Bernard, <i>Mediating With an 800-Pound Gorilla</i> , 60 WASH. & LEE L. REV. 1417 (2004)	391
4. Nancy Neveloff Dubler & Carol B. Liebman, <i>Bioethics: Mediating Conflict in the Hospital Environment</i> , DISP. RESOL. J. May-July 2004 at 32	400
5. Charity Scott, <i>Mediating Life and Death: Review of Nancy N. Dubler & Carol Liebman</i> , BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS (2004), Disp. Resol. Mag., Fall 2004, at 23	403
6. Marc R. Lebed & John J. McCauley, <i>Mediation Within the Health Care Industry: Hurdles and Opportunities</i> , 21 GA. ST. U. L. REV. 911 (2005)	405
C. VICTIM OFFENDER MEDIATION (VOM): RESTORATIVE JUSTICE	408
1. Comments and Questions	408
2. Mark S. Umbreit, Betty Vos, Robert B. Coates & Elizabeth Lightfoot, <i>Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls</i> , 89 MARQ. L. REV. 251 (2005)	409
3. Jennifer Gerarda Brown, <i>The Use of Mediation to Resolve Criminal Cases: A Procedural Critique</i> , 43 EMORY L.J. 1247 (1994)	419
D. MEDIATORS AS BUSINESS DEAL MAKERS: AGENCY THEORY REVISITED	422
1. Comments and Questions	422
2. Scott R. Peppet, <i>Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?</i> , 19 OHIO ST. J. ON DISP. RESOL. 283 (2004)	422
3. Mark C. Suchman & Mia L. Cahill, <i>The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes</i> , 21 LAW & SOC. INQUIRY 679 (1996)	425

Part IV

ADDITIONAL PROCESSES AND APPROACHES

Chapter 10: COURT-CONNECTED ADR PROCESSES	431
A. INTRODUCTION	431
B. AUTHORITY OF COURTS TO REQUIRE LITIGANTS TO USE (AND PAY FOR) ADR	432

TABLE OF CONTENTS

xxix

1. <i>In re Atlantic Pipe Corp.</i> , 304 F.3d 135 (1st Cir. 2002)	432
2. Caroline Harris Crowne, <i>The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice</i> , 76 N.Y.U. L. REV. 1768 (2001)	438
3. Comments and Questions	441
4. Wayne D. Brazil, <i>Should Court-Sponsored ADR Survive?</i> , 21 OHIO ST. J. ON DISP. RESOL. 241, 242-44, 252-58 (2006)	444
C. EARLY NEUTRAL EVALUATION	449
1. Comments and Questions	449
2. Joshua D. Rosenberg & H. Jay Folberg, <i>Alternative Dispute Resolution: An Empirical Analysis</i> , 46 STAN. L. REV. 1487 (1994)	450
D. SUMMARY JURY TRIAL	454
1. Neil Vidmar & Jeffrey Rice, <i>Jury Determined Settlements and Summary Jury Trials</i> , 19 FLA. ST. U. L. REV. 89, 95-103 (1991)	454
2. Comments and Questions	458
E. COURT-ANNEXED (NON-BINDING) ARBITRATION (CAA)	460
F. WHAT IS THE MINIMUM ACCEPTABLE LEVEL OF PARTICIPATION IN COURT-CONNECTED ADR?	461
1. <i>G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.</i> , 871 F.2d 648 (7th Cir 1989)	461
2. Comments and Questions	466
3. John Lande, <i>Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs</i> , 50 UCLA L. REV. 69 (2002)	468
4. Comments and Questions	476
5. Settlement Authority of Government Representatives	478
a. <i>In re Stone</i> , 986 F.2d 898 (5th Cir. 1993)	478
b. Comments and Questions	480
G. APPELLATE MEDIATION	481
1. Ignazio J. Ruvolo, <i>Appellate Mediation — “Settling” the Last Frontier of ADR</i> , 42 SAN DIEGO L. REV. 177 (2005)	481
2. Comments and Questions	489
Chapter 11: PRIVATE ADR PROCESSES	491
A. INTRODUCTION	491
B. MINI-TRIAL	492
1. Jethro K. Lieberman & James F. Henry, <i>Lessons From the Alternative Dispute Resolution Movement</i> , 53 U. CHI. L. REV. 424, 427-29 (1986)	492
2. LESTER EDELMAN ET AL., THE MINI-TRIAL 1-6, 9-17 (U.S. ARMY CORPS OF ENGINEERS 1989) (IWR Pamphlet 89-ADR-P-1)	493
3. Comments and Questions	495
C. ARBITRATION — PRIVATE AND BINDING	496
1. The Place of Arbitration in Modern America	496

2. Arbitration Law in Earlier America and England	497
a. <i>Tobey v. County of Bristol</i> , 23 Fed. Cas. 1313 (D. Mass. 1845)	498
b. <i>Kulukundis Shipping Co., S/A v. Amtorg Trading Corp.</i> , 126 F.2d 978, 982-85 (2d Cir. 1942)	498
c. Comments and Questions	501
3. Soia Mentschikoff, <i>Commercial Arbitration</i> , 61 COLUM. L. REV. 846 (1961)	501
4. Arbitration Legislation	503
a. The Federal Arbitration Act (FAA)	503
b. The Uniform Arbitration Acts	504
c. Labor-Management Arbitration	506
5. An Overview of the Arbitration Process	507
6. Judicial Review of Arbitration Awards Is Extremely Limited	509
a. <i>Burchell v. Marsh</i> , 58 U.S. 344 [17 How. 344] (1854)	509
b. <i>Perini Corp. v. Greate Bay Hotel & Casino, Inc.</i> , 610 A.2d 364 (N.J. 1992), concurring opinion by Chief Justice Wilenz, adopted as the governing law of New Jersey in <i>Tretina Printing, Inc. v. Fitzpatrick & Assoc.</i> , 640 A.2d 788 (N.J. 1994)	511
7. The Supreme Court Strongly Favors Arbitration	512
a. Comments and Questions	512
b. <i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 126 S. Ct. 1204 (2006)	512
D. COLLABORATIVE LAW	516
1. What Is Collaborative Law?	516
2. A Movement Within the ADR Movement	517
3. Mediation and Collaborative Law	517
4. Potential Professional Responsibility Issues Associated With Collaborative Law	518
5. State Action in Support of Collaborative Law	519
E. OMBUDSPERSONS: GOVERNMENT AND CORPORATE	520
1. Philip J. Harter, <i>Ombuds: A Voice for the People</i> , 11 DISP. RESOL. MAG. 5 (Winter 2005)	520
2. ABA Standards for the Establishment and Operation of Ombuds Offices (2004)	523
3. Comments and Questions	524
4. Howard Gadlin, <i>New Ombuds Standards Create Tension and Opportunity</i> , 11 DISP. RESOL. MAG. 15 (Winter 2005)	524
F. LARGE CONSTRUCTION PROJECTS: PARTNERING AND DISPUTE REVIEW BOARDS	529
1. Comments and Questions	529
2. Daniel D. McMillan & Robert A. Rubin, <i>Dispute Review Boards: Key Issues, Recent Case Law, and Standard Agreements</i> , 25-SPG CONSTRUCTION LAW. 14 (2005)	530

3. Kathleen M. J. Harmon, <i>Construction Conflicts and Dispute Review Boards: Attitudes and Opinions of Construction Industry Members</i> , 58-JAN DISP. RESOL. J. 66 (2004)	535
3. LESTER EDELMAN, PARTNERING 1-5, 7-10, 17-20 (U.S. ARMY CORPS OF ENGINEERS 1991) (IWR Pamphlet 91-ADR-P-4)	537
5. Colleen A. Libbey, <i>Working Together While Waltzing in a Mine Field: Successful Government Construction Contract Dispute Resolution With Partnering and Dispute Review Boards</i> , 15 OHIO ST. J. ON DISP. RESOL. 825 (2000)	543
Chapter 12: GOVERNMENT USE OF ADR: THE EXECUTIVE BRANCH	547
A. INTRODUCTION	547
B. THE ADMINISTRATIVE DISPUTE RESOLUTION ACTS (ADRA) OF 1990 AND 1996	548
1. Comments and Questions	548
2. STEPHEN K. HUBER, <i>THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1990</i>	548
3. Jonathan D. Meister, <i>The Administrative Dispute Resolution Act of 1996: Will the New Era of ADR in Federal Administrative Agencies Occur at the Expense of Public Accountability?</i> , 13 OHIO ST. J. ON DISP. RESOL. 167 (1997)	548
C. THE USES OF ADR BY THE FEDERAL GOVERNMENT: JUSTICE DEPARTMENT LEADERSHIP	551
1. Comments and Questions	551
2. Jeffrey M. Senger, <i>Turning the Ship of State</i> , 2000 J. DISP. RESOL. 79	551
3. <i>Too Little Too Late? Ashcroft Issues Support Letter to Agency ADR Officials</i> , 22 ALTERNATIVES TO HIGH COST LITIG. 71 (May 2004)	558
D. TWO GOVERNMENT ADR CASE STUDIES: TORT CLAIMS AND FARMER-LENDER MEDIATION	559
1. Daniel Shane Read, <i>The Courts' Difficult Balancing Act to Be Fair to Both Plaintiff and Government Under the FTCA's Administrative Claims Process</i> , 57 BAYLOR L. REV. 785 (2005)	559
2. Comments and Questions	563
3. Leonard L. Riskin, <i>Two Concepts of Mediation in the FmHA's Farmer-Lender Mediation Program</i> , 45 ADMIN. L. REV. 21 (1993)	563
E. RESOLUTION OF TAXPAYER DISPUTES BY THE INTERNAL REVENUE SERVICE	573
1. Comments and Questions	573
2. Gregory P. Mathews, <i>Using Negotiation, Mediation and Arbitration to Resolve IRS-Taxpayer Disputes</i> , 19 OHIO ST. J. ON DISP. RESOL. 709 (2004)	573

3. Thomas Carter Louthan, <i>Building a User-Friendly Internal Revenue Service: ADR Programs Are Set for Taxpayer Use</i> , 18 ALTERNATIVES TO HIGH COST LITIG. 1 (Jan. 2000)	580
F. NEGOTIATED RULEMAKING [REG-NEG] AND RULEMAKING SETTLEMENTS	582
1. Comments and Questions	582
2. Lynn Sylvester & Ira B. Lobel, <i>The Perfect Storm: Anatomy of a Failed Regulatory Negotiation</i> , 59-JUL DISP. RESOL. J. 44 (2004)	583
3. <i>USA Group Loan Services, Inc. v. Riley</i> , 82 F.3d 708 (7th Cir. 1996)	593
4. Comments and Questions	595
5. Jim Rossi, <i>Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement</i> , 51 DUKE L.J. 1015 (2001)	596
Chapter 13: SETTLEMENT: LAW AND POLICY	605
A. INTRODUCTION	605
B. THE GREAT SETTLEMENT DEBATE	605
1. Owen M. Fiss, <i>Against Settlement</i> , 93 YALE L.J. 1073 (1984)	605
2. Comments and Questions	612
3. Andrew W. McThenia & Thomas L. Shaffer, <i>For Reconciliation</i> , 94 YALE L.J. 1660 (1985)	613
4. Owen M. Fiss, <i>Out of Eden</i> , 94 YALE L.J. 1669 (1985)	617
5. Jethro K. Lieberman & James F. Henry, <i>Lessons from the Alternative Dispute Resolution Movement</i> , 53 U. CHI. L. REV. 424, 432-35 (1986)	620
6. Jeffrey R. Seul, <i>Settling Significant Cases</i> , 79 WASH. L. REV. 881 (2004)	621
C. SETTLEMENT PRACTICES IN THE AMERICAN LEGAL SYSTEM	628
1. Comments and Questions	628
2. Marc Galanter & Mia Cahill, <i>"Most Cases Settle": Judicial Promotion and Regulation of Settlement</i> , 46 STAN. L. REV. 1339 (1994)	628
D. THE LAW OF SETTLEMENT	632
1. Comments and Questions	632
2. <i>Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.</i> , 332 F.3d 976 (6th Cir. 2003)	632
3. <i>Sarkes Tarzian, Inc. v. U.S. Trust Department of Florida Savings Bank</i> , 397 F.3d 577 (7th Cir. 2005)	634
4. <i>Padilla v. LaFrance</i> , 907 S.W.2d 454 (Tex. 1995)	639
5. Comments and Questions	642
6. <i>Beazer East Inc. v. Mead Corporation</i> , 412 F.3d 429 (3d Cir. 2005)	644

Chapter 14: DISPUTE RESOLUTION AND THE COMMUNICATIONS REVOLUTION	647
A. INTRODUCTION	647
B. THE BRAVE NEW WORLD OF THE INTERNET AND ON-LINE DISPUTE RESOLUTION	649
1. Comments and Questions	649
2. Gillian K. Hadfield, <i>Delivering Legality on the Internet: Developing Principles for the Private Provision of Commercial Law</i> , 6 AM. L. & ECON. REV. 154 (2004)	650
3. Andrea Braeutigam, <i>Fusses that Fit Online: Online Mediation in Non-Commercial Contexts</i> , 5 APPALACHIAN L.J. 275 (2006)	659
4. Anita Ramasastry, <i>Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry</i> , 79 WASH. L. REV. 159 (2004)	666
C. DISPUTE RESOLUTION IN A TECHNOLOGY-MEDIATED ENVIRONMENT	669
1. Comments and Questions	669
2. David Allen Larson, <i>Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR</i> , 21 OHIO ST. J. ON DISP. RESOL. 629 (2006)	669
3. Arno R. Lodder & John Zeleznikow, <i>Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model</i> , 10 HARV. NEGOT. L. REV. 287 (2005)	674
4. Janice Nadler, <i>Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking</i> , 9 HARV. NEGOT. L. REV. 223 (2004)	681
D. PRACTITIONERS OF ON-LINE DISPUTE RESOLUTION	686
1. Comments and Questions	686
2. Susan R. Raines, <i>Mediating in Your Pajamas: The Benefits and Challenges for ODR Practitioners</i> , 23 CONFLICT RESOL. Q. 359 (2006)	686
3. Melissa Conley Taylor & Jackie Bornstein, <i>Accreditation of On-Line Dispute Resolution Professionals</i> , 23 CONFLICT RESOL. Q. 383 (2006)	692

Part V

DISPUTE RESOLUTION PROFESSIONALS

Chapter 15: PROFESSIONAL QUALIFICATIONS, PROFESSIONAL LIABILITY	699
A. INTRODUCTION	699
B. REGULATION OF SKILLED CRAFTSMEN AND “PROFESSIONALS”	700
1. Typology of Approaches to Professional Regulation	700

2. Walter Gellhorn, <i>The Abuse of Occupational Licensure</i> , 44 U. CHI. L. REV. 6 (1976)	701
3. Comments and Questions	705
C. CREDENTIALING OF MEDIATORS AND OTHER DISPUTE RESOLUTION PRACTITIONERS	706
1. Paula M. Young, <i>Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field</i> , 21 OHIO ST. J. ON DISP. RESOL. 721, 731-41 (2006)	706
2. Charles Pou, Jr., <i>Assuring Excellence or Merely Reassuring? Policy and Practice in Promoting Mediator Quality</i> , 2005 J. DISP. RESOL. 303	707
3. Sarah Rudolph Cole, <i>Mediator Certification: Has the Time Come?</i> , 11-3 DISP. RESOL. MAG. 7 (Spring 2005)	713
4. Craig McEwen, <i>Giving Meaning to Mediator Professionalism</i> , 11-3 DISP. RESOL. MAG. 3 (Spring 2005)	716
5. Melissa Conley Tyler & Jackie Bornstein, <i>Accreditation of On-line Dispute Resolution Practitioners</i> , 23 Conflict Resol. Q. 383 (2006)	722
D. STANDARDS OF CONDUCT FOR ADR PROVIDERS	722
1. Comments and Questions	722
2. Paula M. Young, <i>Rejoice! Rejoice! Rejoice! Give Thanks and Sing: ABA, ACR, and AAA Adopt Revised Model Standards of Conduct For Mediators</i> , 5 J.L. 195 (2006)	722
E. LIABILITY OF MEDIATORS AND OTHERS	731
1. Comments and Questions	731
2. Michael Moffitt, <i>Suing Mediators</i> , 83 B.U. L. REV. 147 (2003) . . .	731
3. <i>Wagshal v. Foster</i> , 28 F.3d 1249 (D.C. Cir. 1994)	737
F. EXCEPTIONS TO CONFIDENTIALITY: DUTIES TO WARN OR REPORT	741
1. Comments and Questions	741
2. <i>Thapar v. Zezulka</i> , 994 S.W.2d 635 (Tex. 1999)	741
3. Child and Elder Abuse	745
Chapter 16: PLANNING FOR AND AVOIDING DISPUTES: SYSTEMS DESIGN	747
A. INTRODUCTION	747
B. THE MAIN ELEMENTS OF AN ADR SYSTEM DESIGN	748
1. E. WENDY TRACHTE-HUBER, ADR SYSTEM DESIGN: THE PRE-LITIGATION OPTION (1993)	748
2. CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS — A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS 19-32, 117-33 (1995)	750
3. Comments and Questions	759

TABLE OF CONTENTS

xxxv

C. TOTAL QUALITY MANAGEMENT (TQM)	760
1. Comments and Questions	760
2. E. WENDY TRACHTE-HUBER, ADR SYSTEM DESIGN: THE PRE-LITIGATION OPTION — THE ATTORNEY AS CONSULTANT (1993)	760
D. PRODUCTIVE WORKPLACES: PLANNING FOR EMPLOYMENT DISPUTES	761
1. Comments and Questions	761
2. U.S. ARMY CORPS OF ENGINEERS, PARTNERSHIP COUNCILS: BUILDING SUCCESSFUL LABOR-MANAGEMENT RELATIONSHIPS, IWR Working Paper 94-ADR-WP-5 (1994)	762
3. Peter Robinson, Arthur Pearlstein & Bernard Mayer, <i>DyADS: Encouraging “Dynamic Adaptive Dispute Systems” in the Organized Workplace</i> , 10 HARV. NEGOT. L. REV. 339, 340-41, 352-75 (2005)	767
4. WILLIAM L. BEDMAN, ADR: THE HALLIBURTON EXPERIENCE, <i>available at Mediate.com</i> (2002)	772
E. SYSTEMS DESIGN IN CONTEXT: THREE CASE STUDIES	780
1. Comments and Questions	780
2. Daniel I. Gordon, <i>Constructing a Bid Protest Process: The Choices that Every Procurement Challenge System Must Make</i> , 35 PUB. CONT. L.J. 427 (2006)	780
3. Ronald J. Bald & Evette E. Ungar, <i>An Alternative Dispute Resolution Systems Design for the United States Coast Guard</i> , 3 J. AM. ARB. 111 (2004)	788
4. Debra Girardi, <i>The Culture of Health Care: How Professional and Organizational Cultures Impact Conflict Management</i> , 21 GA. ST. U. L. REV. 857, 884-90 (2005)	796
Appendix	A-1
A. NCCUSL, UNIFORM MEDIATION ACT (Promulgated August, 2003)	A-1
B. AAA/ABA/ACR, The Model Standards of Conduct for Mediators (2005)	A-8
C. AAA, Commercial Mediation Procedures (2005)	A-14
D. TEXAS CIVIL PRACTICE AND REMEDIES CODE, CH. 154	A-17
Index	I-1

