

ALTERNATIVE DISPUTE  
RESOLUTION:  
THE ADVOCATE'S  
PERSPECTIVE



# ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE

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## *CASES AND MATERIALS*

Fifth Edition

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# *Dedications*

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For Katey

— *Professor Craver*

For June and Michael

— *Professor Brunet*

For Pat

— *Professor Deason*



# *Preface*

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In this Fifth Edition we have tried to improve and update the basic themes and organization set forth in the earlier editions. Alternative Dispute Resolution has now become institutionalized and has truly come of age. We present the materials with this point in mind. While length and depth of coverage continue to be a challenge, particularly with the popularity of ADR mechanisms, we have tried to keep the materials of similar length to the earlier editions of this book. We continue to stress that most teachers of this course will want to spend time outside the coursebook in order to have their students both negotiate and mediate. We have included a substantial number of simulated mediation and negotiation exercises in the Teacher's Manual.

This casebook is designed for use in a one-semester course that focuses upon the group of alternative dispute resolution processes. Such survey ADR courses are increasingly popular in the law school curriculum and demonstrate that alternative dispute resolution has gained broad acceptance in the American system of resolving disputes.

Four things continue to make this set of materials unique. First, it is our firm belief that the ADR methods cannot be understood without a thorough and initial grounding in negotiation theory and practice. In that spirit, this book contains the most complete treatment of negotiation possible. Only by careful focus on negotiation can the student really comprehend the nuances of mediation and the panoply of court annexed settlement alternatives. Indeed, the reader will find that a theme of this book is that none of the alternatives to litigation can be fully understood without initial rigorous study (including students engaged in simulations) of negotiation. Negotiation is the foundation of alternative dispute resolution. Second, the book stresses the role of the advocate negotiating a settlement, whether the specific alternative is mediation, a court annexed summary jury trial or agency annexed regulatory negotiation. While the book also covers the roles of the neutral, it emphasizes the important task of the attorney and, in particular, the continuing role of negotiation in each of the modes of ADR. Mediation is a form of negotiation in which the advocate should use negotiation skills. Arbitrations often settle before a hearing because of negotiation. Third, the book attempts to present a balanced treatment of ADR and litigation. Most of the prior books in this area are one-sided; they describe ADR techniques with an evangelical fervor and eschew any of the significant criticisms raising questions about various ADR methods. This book integrates the benefits and costs of ADR in an attempt to present a balanced, real-world view of disputing mechanisms. It is only by understanding the potential drawbacks of the various alternatives that the attorney is able to select the optimal mode of disputing. All forms of dispute resolution, including litigation and the modes of ADR described in this text, have costs as well as benefits. Fourth, the book is comprehensive. It offers detailed treatment of negotiation, mediation, arbitration, and government sponsored ADR. Indeed, the book's subparts are detailed enough that the text could be used in a two or three hour law school ADR course in which the teacher chooses to focus on only two or three of the alternatives (for example, a two hour course on negotiation and mediation or a mediation course in which the teacher desired coverage of negotiation prior to treating mediation).

The book's organization follows from the above paragraph. We start with negotiation for two reasons. One, negotiation is and is likely to remain the principle ADR technique. Negotiation is simple, inexpensive and entirely in the hands of the disputants and, for that

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## *Preface*

reason, ought to be the starting mode of dispute resolution. We are confident that readers will find our approach to negotiation both thorough and straightforward. Our thinking is that, while some may be born with innate negotiation skills, virtually anyone can be trained to negotiate competently. Moreover, an initial understanding of negotiation will help the student understand our second subject, assisted negotiation or mediation. Understanding of mediation without prior grounding in negotiation is impossible. Similarly, coverage of court annexed ADR really amounts to learning a variety of settlement techniques, each of which relies upon negotiation. For all these reasons, negotiation probably should come first and be treated rigorously in a survey ADR course.

Each of us views this book as an accompaniment to a set of practice simulations or problems to be done by students. We deem student simulations an essential part of the ADR course. We have placed numerous problems for use in negotiation and mediation simulations in our Teachers Manual. Potential users of this book should consult the Teachers Manual for perusal of these problems. We include a wide variety of problems to give the book's users choices as to different types of disputes. We believe strongly that students learn negotiation and mediation by participating in these processes and endorse the idea that a survey course should also involve skills training. Teachers may want to use some of the many videotapes on the individual ADR methods during various points of this course. Individual tapes are recommended in the Teachers Manual. The practical and theoretical reading contained in the negotiation and mediation portions of this book have limited utility if used without integration of real-world simulations and problems. Interjection of problems into the text is needed for any ADR course to reach its potential. We have found that coverage of the text comes alive if fully integrated into post-mortem discussion of simulations.

The organization of the ADR course typically follows this book with negotiation first, followed by mediation and then covering the rest of the alternatives. In contrast, one of us has experimented with starting the ADR course with arbitration. Teachers should give this option some thought. Students find that the unit on arbitration resembles litigation, and, for that reason, is easily digestible at the start of the course. The arbitration sequence of this book involves numerous fascinating cases and the deceptive but critical Federal Arbitration Act. The "familiar" and traditionally demanding feel of the arbitration portion of the course makes it easy to start with at the beginning of a semester. Yet, if arbitration is covered in the second half of a semester, it can be a "reality jolt" for law students who have enjoyed the skills training aspects of negotiation and mediation, usually taught at the start of the ADR course. Teachers who follow the usual path of doing arbitration near the end of a course will need to give thought to helping the students make the transition "back to law school." Tough cases and hard questions are the order of the day for a well-covered arbitration phase of an ADR course. In our experience, law students enjoy greatly participating in the simulations in the negotiation and mediation phases of this course. Because the negotiation and mediation phases of this course involve only minimal doctrine, some students go into a form of withdrawal when they then turn to arbitration, an area in which problems and simulations have little value. Following arbitration, the teacher can adopt the more traditional order of covering negotiation, mediation and other alternatives. Of course, the price of this option is to lose the value of beginning with the least intrusive, most private process, negotiation, and to turn to other varieties of disputing, each of which involves increasingly formal procedures.

We use the typical conventions when editing longer cases and articles excerpts. Where



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material is omitted within a sentence we have used an ellipse (. . .). We have inserted three asterisks (\* \* \*) to denote longer deletions. While we have retained several case and article citations to provide the students additional authority that may be helpful to electronic use, we do not indicate our many deletions of case authority.

A comprehensive selective ADR Bibliography can be found at the end of the book. This updated Bibliography combines the Negotiation and Mediation citations, which were listed separately in the previous editions. We have used the social science form of citing to books and articles in this Bibliography in the Negotiation (Part One) and Mediation (Part Two) sections of the book. We used the social science citation form in these parts of the book because much of the authority is social science in nature, and we wanted to avoid breaking up the flow of the text with lengthy legal citations. In contrast, we use the standard legal citation system (showing author, title and precise citation) in the parts of the book that are more “legal,” arbitration (Part Three) and Government Sponsored ADR (Part Four). There is less text material in these sections and the “legal” citation system meshes well with these more “legal” parts of the book.



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