

# 如何当好调解员中美调解培训启示录

主编 廖永安

RUHE DANGHAO TIAOJIEYUAN ZHONGMEI TIAOJIE PEIXUN QISHILU





湖潭大学出版社



# 如何当好调解员系列丛书 RUHE DANGHAO TIAOJIEYUAN XILIE CONGSHU

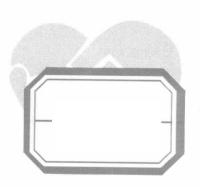
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ZHONGMEI TIAOJIE PEIXUN QISHILU





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中美调解培训项目由 中国湘潭大学法学院 美国马萨诸塞州大学麦可迈克研究院 马萨诸塞州法官协会 联合主办







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- 自 1989 年起担任调解员/仲裁员 Mediator/Arbitrator since 1989
- 曾任波士顿大学法学院、东北大学法学院、 哈佛大学法学院教授/讲师(自 1990 年起任 调解课程客座讲师)
  - Professor/Instructor at Boston University School of Law, Northeastern University School of Law, Harvard Law School (guest lecturer in Mediation Course since 1990-present)
- 大型律师事务所执业律师(1975—2004年)
   Practicing attorney with large firms (1975 2004)



#### 克莱・麦圭尔 律师

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   Boston (1986 2008)
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   Past General Counsel, Harvard Community
   Health Plan
- 马萨诸塞州公众服务行政办公室法务总监
   Past General Counsel, Executive Office of Human Services, Commonwealth of Massachusetts
- 拉瑟尔社区(Lasell Village, 大学赞助长者住区) 理事会成员;前任马萨 诸塞州计划生育联合会理事会成员
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   Professor of Law and Former Dean, Suffolk University Law School
- 任教调解、替代性纠纷解决办法与宪法课程 Teaches courses for law students in Mediation, ADR, Constitutional Law
- 自1992年起,担任调解员,以及社区调解项目的训练员

Mediator and Mediation Trainer in Community Mediation Programs since 1992

马萨诸塞州法拉名翰地方法院调解服务委员会委员及前任主席
 Board of Directors (past President), Framingham Court Mediation Services



#### 莉莲・美兰达 法官 (卸任) Hon. Lillian Miranda (ret.)

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   Justice, Franklin-Hampshire Juvenile Court (1995 2011)
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   Hampshire County Bar Association, Chair, Committee on ADR (1990 ~ 1994)
- 法兰克林—罕布什尔青少年法院分类援助项目 (2005—2011 年)
   Franklin-Hampshire Juvenile Court, Triage Project (2005 2011)
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# 总 序

调解,亘古绵延,传承至今,不仅是中华民族的优良传统,也是享誉世界的 纠纷解决之 "东方经验"。在长达数千年的历史长河中,调解不仅是外显于传统 社会的治理模式,也是内嵌于淳朴人心的处事习惯与生活方式,不仅是人们定纷 止争的理想选择、思维习惯,也是为人们所称颂的息事宁人、和睦相处的传统美德。更为弥足珍贵的是,源自于东方的调解文化,在发展和传播的过程中,其理 念和价值早已为域外文明所接受,成为西方话语主导下的现代司法体系中一个难得的东方元素和中华印记。

穿越数千年,历久而弥新。发源于传统中华文化,扎根于现代司法体系中的 调解,在社会转型、矛盾凸显的历史新时期,俨然已成为社会和谐稳定不可或缺 的降压阀、消火栓。当前,我国正处于经济社会发展的重要战略机遇期和社会矛 盾凸显期,维护社会和谐稳定的任务艰巨、繁重,构建人民调解、行政调解、司 法调解"三位一体"大调解格局,已成为推进社会矛盾化解、推进社会管理创 新的重要抓手,成为多元化纠纷解决机制中的重要一环。然而,在时代赋予调解 更多使命,在社会寄予调解更高期待的同时,调解能否承载起这样的使命,能否 满足这样的期待,却还是一个值得探讨和反思的问题,以至于无论是在学术界, 还是在实务界,依然还存在不少争议。盖因为调解理论研究及规范建设的相对滞 后,使调解的价值局限于传统的小圈子里,使调解的作用止步于调解员的个人经 验前,调解的体系化、规则化、标准化建设亟待加强,影响了调解价值理念的广 泛认同以及功能作用的充分发挥。以调解员的培训为例,作为调解的主体力量, 目前活跃在人民调解、行政调解、司法调解战线上的调解员数以百万计,但是, 调解员队伍建设缺乏强有力的理论指导和体系化的培训支撑。调解员队伍规模很 大但素质参差不齐、调解程序因地就宜但缺乏必要的规范、调解方法灵活多样但 主要囿于直接经验。因此,建立科学、系统、规范、实用的调解员理论体系和调 解员培训体系,已经是调解事业可持续发展的关键瓶颈,亟待各方重视,抓紧 解决。

经由近年来中外法律的交流,我们已经了解到,在调解这一领域,不少后发 国家,调解的学科化或科学化发展趋势十分明显。社会学、心理学、神经学等研 究成果在调解领域的广泛应用,不仅大大提升了调解的科学化水平,还使调解成为了一门新兴的综合学科。体系化、标准化的调解课程不仅是调解员培训必修的课程,也成了法学院学生的常规课程。调解学科的兴起,还催生了一个行业或职业。在一些国家,调解已经商业化,成为了人们可以终身为业的一种职业。我们不得不承认,在调解的现代转型上,实际上在不少方面我们已经落后了。这也引起了我们的忧思,为何我们的文化传统在异域他乡就可以演变为一门学科、一门生意、一种职业呢?实用主义的引导与作用,或许是一个答案。而从技术层面而言,精细化的研究始终是一个不可逾越的基础。如果我们再不警醒,再不转变调解的研究方式,再不提升调解的精细化研究水平,长此以往,调解话语权的流失似乎是必然的,调解是否有可能成为又一个纯粹的西方话语呢?

基于这样的使命感,我们策划出版了"如何当好调解员系列丛书"。我们希望以"如何当好调解员"为切入点,一方面,对我国调解传统文化及其应用展开精细化的研究,探索调解由传统向现代转型的路径,努力掌握调解的话语权;另一方面,也希望抓住调解员这一核心要素,从调解经验总结、调解经典案例评析、调解社会心理学应用、调解策略梳理等多维度构筑我国调解员严密、科学的培训体系,为大力加强调解员队伍建设,全面发挥调解在促进社会矛盾纠纷化解、社会管理创新中的作用提供有力的智力支持。

本套丛书也是湖南省调解理论研究与人才培训中心推出的首项成果。2012年1月9日,在中共湖南省委书记周强同志的高度重视、亲切关怀、殷切期望下,湖南省司法厅与湘潭大学共建的湖南省调解理论研究与人才培训中心正式成立,旨在立足湖南、辐射全国、面向世界,在充分挖掘传统调解文化和开发本土调解资源的基础上,合理借鉴域外经验,综合借助法学、社会学、心理学、历史学等研究方法,大力推动法治框架下调解基础理论研究与创新,积极推进社会管理创新背景下调解人才队伍建设,力争为构建适应我国现代化进程和具有普世价值意义的调解话语体系作出一分贡献。

我们期待,这一套丛书的出版,能够为调解的理论研究和规范化建设添砖加瓦,也能够为吸引更多的人投身调解这项事业添薪加火。期待与你一路前行。

一种复

(谢勇:湖南省人大常委会副主任、湘潭大学法学院名誉院长、教授、博士生导师)

#### **Preface to Mediation Publication Series**

The history of mediation can track back to thousands years ago. It has been a traditional mechanism of dispute resolution for the Chinese, and is known as "Oriental Experience". In several thousand years, mediation has been not only a visible social regulatory method, but also a living style internal to Chinese people; not only a preferable system to resolve dispute, but also a virtue necessity for people to live together with harmony. It is notable that the culture of mediation was disseminated to and accepted by the foreign culture, and has become a unique oriental element in the Western judicial system.

History endows mediation with renewed spirit. Originating from traditional culture and being merged into modern judicial system, mediation is currently the pressure vent for disputes and conflicts necessary to a peaceful society since China has undergone a tremendous social transformation with strategic opportunities and social contradictions coexisting. The transformation brings challenges to maintain a peaceful and harmonious society. Developing a mechanism of Grand Mediation with People's mediation, administrative mediation and judicial mediation has become a very important method to resolve social disputes and renovate the social management, and also a substantive element of comprehensive dispute resolution mechanism. However, whether and how mediation can fulfill its function to meet our expectation is still a problem demanding our reconsideration and discussion. Disagreements related to mediation still exist in both academic and practical circles. In addition, current mediation research and code enacting lags behind, mediation practice mainly depends on the mediator's personal experience rather than on systematical and standardized rules and procedures, which greatly restricts the full play of mediation values. Take mediator training as an example; even though there are more than millions of mediators in People's mediation, administrative mediation and judicial mediation, there are insufficient theoretical guide and systematical training program. We have large scale in the number of mediators while there are individual differences in terms of their skills and ability; we make procedures of mediation in accordance with the local characteristics but without standardized mediation rules; we have versatile and flexible ways to mediate but those are mainly from our direct experience. Therefore, to establish a scientific and practical mediation training system is the key answer to a sustainable development of our mediation undertaking, relevant departments should attach great importance to this field.

Through recent communication with foreign fellows, we realize that mediation has become a scientific discipline in other countries. Knowledge of Sociology, Psychology, and Neurology has wide application in mediation. Systematic and formalized mediation courses become mandatory course to mediators and for law school students. The discipline of mediation gives rise to a brand new profession. In some countries, mediation has already been commercialized and become a separate profession in which mediators can practice. We have to admit that we fall behind in many aspects in the development of mediation. We are wondering why our traditional culture can be developed into a discipline, an industry and even a profession in other countries instead of in our own country. May be Pragmatism is the answer. From the technique perspective, detailed research is the necessary foundation for the development of mediation. If we keep blind and refused to change the way to research on mediation and enhance the level of our research, we will for sure fall behind and Mediation might become a pure Western ideology.

With a sense of mission to enhance the Chinese mediation cause, we plan to compile this mediation publication series. We hope to detail the research on our mediation traditions, explore a new path to research and enhance our status on mediation. In the meantime, we also want to focus on mediators—the essential element of mediation—to review the mediation experience, analyze classic mediation cases and research on the application of Sociology and Psychology in mediation. Therefore we can develop a multi-dimensional, detailed and scientific Mediator Training Program so as to strengthen our mediator team, contribute to social disputes resolution and provide intelligent support to social management.

This series is the first accomplishment of the Hunan Theoretical Research and Training Center of Mediation. On January 9, 2012, under the strong support and zeal-

ous care of Secretary Zhou Qiang, the provincial head of the Party, Hunan Provincial Department of Justice and Xiangtan University we established Hunan Theoretical Research and Training Center of Mediation. The Purpose is to research the traditional mediation culture and develop the available mediation resources to serve mediation practice provincially and nationally, and even later globally. The Center will learn from the foreign countries, utilize the research mechanism of Jurisprudence, Sociology, Psychology and History. The Center will conduct researches of how to development the fundamental scheme of medication compatible with the Chinese legal system, and to contribute to training of mediation experts and mediators. The ultimate goal is to contribute to forming the modern Chinese mediation theory and practices which is both nationally and universally.

We expect the publication of this series can make valuable contribution to the research and code enacting of mediation, and ignite people's enthusiasm to the mediation profession. We are looking forward to your participation!

> Xie Yong Jan. 18,2012

(Xie Yong: Vice Director, Standing Committee of Hunan Provincial People's Congress; Dean Emeritus, Professor and Doctoral Supervisor Xiangtan University Law School)

# 序一

2011年,由马萨诸塞州法官、实务界人士、学者共同组成的法律代表团来到湘潭大学参与湖南省调解理论研究与人才培训中心的筹建,同时开展了为期一周的美国调解实务培训。湖南省调解理论研究与人才培训中心由湘潭大学与湖南省司法厅共同组建,中心的成立为湖南调解理论研究与人才培养搭建了一个崭新的平台。该中心拥有战略地理和经济区位双重优势——湖南是中国的交通要塞,经济高速发展,位居全国前列,在国际市场中也占据着越来越重要的地位。调解课程结束后,该中心计划将此次培训的实况整理出版,本书就是对此次调解课程的全程纪录。

调解在中国源远流长,拥有超过两千年的历史。如今,调解在美国应用广泛,调解的优势显而易见:调解能避免高额的诉讼费用和繁冗的诉讼程序,如证据开示、集团诉讼、惩罚性赔偿和陪审团判决等;调解允许当事人全程参与、充分表达其意见和忧虑;调解促成各方聚首、达成和解协议;调解还能使当事人更注重未来的关系而非过往的错误。同时,调解是一个保密的过程,能避免诉讼公开和媒体披露。在美国,当事人可以自主选择调解员。当事人通过接触调解员,了解并分析其背景,最终找到适合的调解员。调解在美国得到广泛的认可和应用,无论是处理小型商业纠纷还是解决复杂商事案件,调解都扮演着重要的角色。

在此次调解培训期间,导师引入美国争端解决方案,巧妙设计课程体系,旨在为调解员打下坚实的基础。课程形式丰富多彩,包括调解技巧互动学习、导师讲座、角色扮演、录像演示等。美国的调解鼓励当事人自行寻找解决方案,因此我们的导师也鼓励调解员要掌握倾听技巧,运用累积的经验和策略,积极参与实践演练。此次培训是原汁原味的美国调解员培训课程,向我们展示了适当性纠纷解决机制(ADR)的广泛运用。同时,该课堂鼓励大家分享新观点,鼓励学员贡献自己的新知,增进了彼此间的对话与交流。学员们的热情参与以及对美国调解模式的高度认可,为本书提供了丰富的素材。学员们认真分析各种调解策略并

积极向导师反馈信息,在提升自我的过程中也激励着对调解领域感兴趣的其他人士。我相信通过此次培训,中国定将结合自身实际开发出适合中国国情的独具特色的调解课程。

衷心感谢湘潭大学对马萨诸塞州法律代表团成员热情周到的款待,让我们又一次感到宾至如归。在此,我要特别感谢廖教授,他的不懈努力与长久坚持给中 美双方创造了相互合作、彼此学习的机会。

> 温蒂·葛申刚法官(退休) 2012年2月于马萨诸塞州波士顿