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RESOLVING DISPUTES  
Theory, Practice, and Law

*Third  
Edition*



Wolters Kluwer

ASPEN CASEBOOK SERIES

# **Resolving Disputes Theory, Practice, and Law**

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**Third Edition**

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# Resolving Disputes

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## PREFACE

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The title of this book, *Resolving Disputes*, reflects the active role of lawyers in representing clients who retain us to conclude their disputes favorably. This text is based on three key assumptions: First, in order to represent clients effectively and craft successful outcomes, the next generation of lawyers must be able to use the full spectrum of dispute resolution options and match the appropriate process to the dispute. Second, new lawyers are much more likely to encounter dispute resolution processes as advocates or advisors to clients rather than as professional neutrals. Finally, a textbook on dispute resolution should be interesting to read, should bring together the latest and best writing on the use and limits of alternative dispute resolution (ADR), and lend itself to interactive teaching.

Our book, therefore, has a different emphasis from most other ADR texts. It is written from the perspective of a lawyer representing clients, rather than focused on the reader's own interests or serving as a neutral. The text is practical, while grounded in theory. The material is lawyer oriented, but enriched by interdisciplinary knowledge. The readings are current, yet do not neglect the historical roots of ADR.

Real-life disputes and literary examples are provided to illustrate vividly the readings and pique interest. Many questions are asked and problems posed to provoke critical thinking about the readings and stimulate class discussion. Accompanying exercises and role-plays allow students to apply the readings and bring the material to life. Most of the exercises and role-plays are based on the types of disputes in which lawyers are most likely to find themselves—significant legal disputes.

We begin the book with an overview of the disputing universe, including the “vanishing trial” and the importance of counseling clients to help them match their dispute to the appropriate resolution process. After an orientation to the full spectrum of dispute resolution and its context for lawyers, we study the lawyer's role in the four categories of alternatives to trial—negotiation, mediation, arbitration, and stepped or hybrid processes. In each section we cover theory, techniques, policy, ethics, and law.

The negotiation section starts with the nature of conflict, the roles of perceptions, emotions, and psychological factors. We analyze both competitive and cooperative approaches, with a step-by-step explanation and comparison. The negotiation process and outcome-enhancing skills are covered in detail from preparation to writing the agreement. Students are guided to explore issues of style, gender, culture, and race. A rich selection of readings is provided, and additional notes enhance the negotiation coverage, including use of decision analysis, computer software, and Web assistance.

An inside look at the mediation of a prominent student death case and the Microsoft litigation introduces the mediation section. Readings and exercises highlight how lawyers can shape the mediation process to their clients' advantage. We focus on caucus-based mediation because that is the format most

students will encounter in law practice, but also discuss and compare alternative approaches such as no-caucus and transformative mediation. In doing so we emphasize the lawyer's role representing clients and ways in which attorneys can take advantage of the mediator's presence to advance their clients' interests. The application of mediation to several important categories of disputes and situations involving lawyers is examined, including family, employment, environmental, intellectual property, victim-offender, and business deals. Court-connected mediation and concerns about fairness are also covered.

In the expanded arbitration section we provide hands-on exercises that involve scenarios often encountered by new lawyers and narratives on what a lawyer needs to know to maximize clients' interests when drafting agreements to arbitrate, choosing arbitrators, and advocating for a client. Students also have the opportunity to deliberate on and draft arbitration awards. This practice-oriented treatment includes many recent developments, including the Deflategate case, and insights from recent surveys of arbitrators and counsel. The section also includes an overview of different forms and applications of arbitration; comparisons with litigation and other dispute resolution processes; and coverage of the legal framework for arbitration. Special attention is given to problems of fairness in adhesion contracts, recent Supreme Court cases, and legislation.

The last section presents ways in which multiple conflict resolution approaches have been integrated in hybrid dispute resolution processes and multifaceted court programs, moved upstream to help prevent and resolve conflicts before they ripen into litigation, and designed into systems for more efficiently resolving a flow of cases. Finally, we look at new ways lawyers can apply dispute resolution knowledge and skills to better serve clients, the role of technology applied to ADR, and why the work of lawyers in helping to appropriately and peacefully resolve disputes is important.

This third edition follows the same organization that proved popular in prior editions and contains the same core elements. We have updated some of our narrative and included excerpts from the most recent ADR writings. We also take advantage of technology, and of students' increasing preference for electronic and video formats. Items that have traditionally gone into the course book's appendix now appear on this book's Web site, including a list of references. This makes this book easier to carry without sacrificing depth and allows readers to download specific codes or standards for discussion. The Web site also provides streaming videos of negotiations and mediations to illustrate some of the points and techniques presented in the readings and to complement the role-plays. There are new arbitration games and lively exercises on the Web site to enhance the arbitration material.

A note about form: In order to focus discussion and conserve space, we have substantially edited the readings and have deleted most footnotes and case citations. Most reference sources are cited only by authors' last name and date of publication, with full citations available in the reference list on the book's web site. Deletions of material are shown by three dots, but omitted footnotes and other references are not indicated.



This book is the culmination of our combined decades of teaching, practicing, and shaping dispute resolution in legal contexts. Although our acknowledgments follow, we are especially grateful to the many students and lawyers we have had the pleasure of teaching. They have inspired us and guided what we have selected here to present to the next generation of lawyers.

January 2016

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- Adair, Wendy, L. and Jeanne M. Brett, "Culture and Negotiation Process" in *The Handbook of Negotiation and Culture* by M. Gelfand and J. Brett, eds. Copyright © 2004 M. Gelfand and J. Brett. Reprinted by permission.
- Adler, Robert S., and Elliot M. Silverstein, "When David Meets Goliath: Dealing with Power Differentials in Negotiations," 5 *Harvard Negotiation Law Review*. Copyright © 2000 Harvard Negotiation Law Review. Reprinted by permission.
- Arnold, Tom, "20 Common Errors in Mediation Advocacy," 13 *Alternatives* 69 (1995). Copyright © 1995 John Wiley & Sons, Inc. Reprinted by permission.
- Birke, Richard, *Decision Trees Made Easy*. Copyright © 2004 Richard Birke. Reprinted by permission.
- Bryan, Kathy, A., "Why Should Businesses Hire Settlement Counsel," 195 *Journal of Dispute Resolution*. Copyright © 2008 Journal of Dispute Resolution. Reprinted by permission.
- Cohen, Amy, "Gender: An (Un)Useful Category of Prescriptive Negotiation Analysis," 13 *Texas Journal of Women and Law*. Copyright © 2003 *Texas Journal of Women and Law*. Reprinted by permission.
- Craver, Charles B., "Effective Legal Negotiation and Settlement," in *Effective Legal Negotiation and Settlement*. Copyright © 2001 Matthew Bender & Company, Inc., a member of the LexisNexis Group. Reprinted by permission.
- Craver, Charles B., "The Impact of Gender on Negotiation Performance," 14 *Cardozo Journal of Conflict Resolution*. Copyright © 2013 *Cardozo Journal of Conflict Resolution*. Reprinted by permission.
- Craver, Charles B., "The Inherent Tension Between Value Creation and Value Claiming During Bargaining Interactions," 101 *Cardozo Journal of Conflict Resolution*. Copyright © 2010 *Cardozo Journal of Conflict Resolution*. Reprinted by permission.
- Ebner, Noam, "Negotiation Via (The New) Email," in *Negotiation Excellence: Successful Deal Making*, Second Edition, by M. Benoliel, ed. Copyright © 2014 World Scientific Publishing, Singapore. Reprinted by permission.

- Epstein, Lynn A., "Post-Settlement Malpractice: Undoing the Done Deal," 46 *Catholic University Law Review*. Copyright © 1997 Catholic University Law Review. Reprinted by permission.
- Fisher, Roger, "Negotiating Powers: Getting and Using Influence," in J. William Breslin and Jeffrey Rubin, eds., 27 *Negotiation American Behavioral Scientist*. Copyright © 1983 Sage Publications. Reprinted by permission.
- Fiss, Owen M., "Against Settlement," 93 *Yale Law Journal*. Copyright © 1983 the Yale Law Journal Company, Inc. Reprinted by permission.
- Goodpaster, Gary, "A Primer on Competitive Bargaining," 325 *Journal of Dispute Resolution*. Copyright © 1996 *Journal of Dispute Resolution*. Reprinted by permission.
- Heen, Sheila, and John Richardson, "I See a Pattern Here and the Pattern is You," in *The Handbook of Dispute Resolution* by M. I. Moffitt and Robert C. Bordone, eds. Copyright © 2005 John Wiley & Sons, Inc. Reprinted by permission.
- Hetherington, H., Lee, "The Wizard and Dorothy, Patton and Rommel: Negotiation Parables in Fiction and Fact," 289 *Pepperdine Law Review*. Copyright © 2001 *Pepperdine Law Review*. Reprinted by permission.
- Hinshaw, Art, and Jess K. Alberts, "Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics," 16 *Harvard Negotiation Law Review*. Copyright © 2011 *Harvard Negotiation Law Review*. Reprinted by permission.
- Kichaven, Jeffrey, G. "How Advocacy Fits in Effective Mediation," 16 *Alternatives*. Copyright © 1999 John Wiley & Sons, Inc. Reprinted by permission.
- Kiser, Randall, "The Emotionally Attentive Lawyer: Balancing the Rule of Law with the Realities of Human Behavior," 15 *Nevada Law Journal*. Copyright © 2015 *Nevada Law Journal*. Reprinted by permission.
- Korobkin, Russell, "A Positive Theory of Legal Negotiation," 88 *Georgetown Law Journal*. Copyright © 2000 *Georgetown Law Journal*. Reprinted by permission.
- Korobkin, Russell, Michael Moffit, and Nancy Welsh, "The Law of Bargaining," 87 *Marquette Law Review*. Copyright © 2004 *Marquette Law Review*. Reprinted by permission.
- Longan, Patrick, "Ethics in Settlement Negotiations: Foreword," 52 *Mercer Law Review*. Copyright © 2001 *Mercer Law Review*. Reprinted by permission.
- Menkel-Meadow, Carrie, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 *UCLA Law Review*. Copyright © 1984 Carrie Menkel-Meadow. Reprinted by permission.
- Miller, Lee E., and Jessica Miller, "A Woman's Guide to Successful Negotiating." Copyright © 2002 the McGrawHill Companies. Reprinted by permission.
- Mnookin, Robert H., *Bargaining with the Devil: When to Negotiate, When to Fight*. Copyright © 2010 Simon & Schuster. Reprinted by permission.

- Mnookin, Robert H., "Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict," 8 *Ohio State Journal of Dispute and Resolution*. Copyright © 1993 Robert H Mnookin. Reprinted by permission.
- Mnookin, Robert H., Scott R. Peppet, and Andrew S. Tulumello. *Beyond Winning: Negotiation to Create Value in Deals and Disputes*, pp. 37-42, 282-286. Cambridge, MA: The Belknap Press of Harvard University Press. Copyright © 2000 the President and Fellows of Harvard College. Reprinted by permission.
- Moffitt, Michael, "Contingent Agreements: Agreeing to Disagree About the Future," 87 *Marquette Law Review*. Copyright © 2004 Marquette Law Review. Reprinted by permission.
- Moffitt, Michael, "Three Things to Be Against (Settlement, Not Included)," 78 *Fordham Law Review*. Copyright © 2009 Fordham Law Review. Reprinted by permission.
- Nadler, Janice, "Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Deal Making," 223 *Harvard Negotiation Law Review*. Copyright © 2004 Harvard Negotiation Law Review. Reprinted by permission.
- Nelken, Melissa, *Understanding Negotiation*. Copyright © 2007 Matthew Bender & Company, Inc., a member of the LexisNexis Group. Reprinted by permission.
- Peppet, Scott R., "Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?" 38 *Ohio State Journal on Dispute Resolutions*. Copyright © 2004 Ohio State Journal on Dispute Resolutions. Reprinted by permission.
- Peppet, Scott R., "Mindfulness in the Law and ADR: Can Saints Negotiate?" 7 *Harvard Negotiation Law Review*. Copyright © 2002 Harvard Negotiation Law Review. Reprinted by permission.
- Poswall, John M., *The Lawyers: Class of '69*. Copyright © 2003 John M. Poswall. Reprinted by permission.
- Robbennolt, Jennifer, K., "Apologies and Legal Settlement: An Empirical Examination," 102 *Michigan Law Review*. Copyright © 2003. Reprinted by permission.
- Rosenberg, Joshua D., "Interpersonal Dynamics Helping Lawyers Learn the Skills, and the Importance of Human Relationships in the Practice of Law," 55 *University of Miami Law Review*. Copyright © 2004 the University of Miami Law Review. Reprinted by permission.
- Ross, David, S., "Strategic Considerations in Choosing a Mediator: A Mediator's Perspective," 2 *Journal of Alternative Dispute Resolutions in Employment*. Copyright © 2000 Journal of Alternative Dispute Resolutions in Employment. Reprinted by permission.
- Rummel, R.J. "The Subjectivity Principle," in *The Conflict Helix*. Copyright © 1991 Transaction Publishers. Reprinted by permission.
- Saperstein, Guy T., *Civil Warrior: Memoirs of a Civil Rights Attorney*. Copyright © 2003 by Guy T. Saperstein. Reprinted by permission.
- Sebenius, James K., "Caveats for Cross-Border Negotiations," 18 *Negotiation Journal*. Copyright © 2002 Blackwell Publishers Ltd. Reprinted by permission.

- Shell, G. Richard, "The Second Foundation: Your Goals and Expectations," and "Step Four: Closing and Gaining Commitment," in *Bargaining for Advantage* by G. Richard Shell, Copyright © 1999, 2006 Viking Penguin, a division of Penguin Group (USA), Inc. Reprinted by permission.
- Welsh, Nancy A., "Perceptions of Fairness in Negotiation," 87 *Marquette Law Review*. Copyright © 2004 *Marquette Law Review*. Reprinted by permission.
- Wetlaufer, Gerald, "The Limits of Integrative Bargaining," 85 *Georgetown Law Journal*. Copyright © 1996 *Georgetown Law Journal*. Reprinted by permission.
- White, James J., "Pros and Cons of 'Getting to YES'; Roger Fisher, Comments on White's Review," 34 *Journal of Legal Education*. Copyright © 1984 *Journal of Legal Education*. Reprinted by permission.
- Williams, Gerald R., "Negotiation as a Healing Process," 1 *Journal of Dispute Resolution*. Copyright © 1996 *Journal of Dispute Resolution*. Reprinted by permission.
- Williams, Gerald R., and Charles Craver, 79 *Legal Negotiation*, Copyright © 2007 West Publishing. Reprinted by permission.
- Wood, Robert W., "Taxing Matters in Settling Cases," 41 *California Lawyer*. Copyright © 2007 *California Lawyer*. Reprinted by permission.
- Zitrin, Richard A., and Carol M. Langford, "The Moral Compass of the American Lawyer," in *The Moral Compass of the American Lawyer*. Copyright © 1999 Richard Zitrin and Carol M. Langford. Reprinted by permission of Ballantine Books, a division of Random House, Inc.

## A NOTE FOR PROFESSORS

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A comprehensive Teacher's Manual is available only on line. Professors adopting *Resolving Disputes*, Third Edition, for classroom use may download the manual at [www.aspenlawschool.com/books/Folberg\\_ResolvingDisputes\\_3e](http://www.aspenlawschool.com/books/Folberg_ResolvingDisputes_3e) with the appropriate password. For assistance in accessing the Teacher's Manual or other help please contact a Wolters Kluwer sales assistant at 1-800-950-5259 or email [legaledu@wolterskluwer.com](mailto:legaledu@wolterskluwer.com)

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