EXAMPLES & EXPLANATIONS

Dispute Resolution

Third Edition

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Wolters Kluwer
Law & Business

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Dedications

To Roger Fisher, who gave us our passion for this field.
To Bruce Patton, who taught us to teach.
To Bob Mnookin, who made teaching possible for us.
To Frank Sander, who taught us to take responsibility for the future of the field.

Michael and Andrea

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Preface

No matter what kind of law you choose to practice, we are confident that the topics covered in this book will play a central role. Litigators in modern times resolve far more cases voluntarily than through trial. Transactional lawyers negotiate the terms of deals. Family lawyers and their clients routinely attempt to mediate agreements before turning to a court to impose the terms of a parenting plan or a division of marital assets. Defense attorneys and prosecutors spend considerable energy negotiating plea agreements. Estate planners and probate attorneys anticipate (and sometimes clean up after) disputes that arise following the death of a family member or business partner. Regulatory agencies often engage in negotiated rulemaking. Court administrators routinely direct cases away from traditional litigation paths, in favor of voluntary dispute resolution mechanisms. Arbitration clauses are commonplace in commercial contracts, employee handbooks, and consumer agreements. And so on. In short, dispute resolution is everywhere in the practice of law.

Despite its importance, the law of dispute resolution often finds itself scattered throughout a range of courses. Your Contracts class will teach you about the law of fraud. Your Ethics class will teach you about your duty to advise your client about settlement opportunities. Your Trial Practice class will teach you about the integration of settlement talks into the cadence of modern litigation. And entire law school courses (like Negotiation or Mediation or Arbitration) focus on specific dispute resolution processes. Each of these is important. But none of these courses fully paints the legal landscape within which dispute resolution occurs.

This book aims to provide a comprehensive view of that legal landscape, and we are delighted to offer it in the Examples and Explanations format. Much of dispute resolution is about *practice* — the application of principles and ideas to concrete circumstances. In what circumstances can negotiators find opportunities for creative settlement? What are the boundaries of legally acceptable behavior by negotiators? What factors influence negotiators' decisions? What constraints and opportunities does mediation present? Under what circumstances are dispute resolution conversations confidential? To what extent can disputants be diverted from traditional litigation processes? What powers does a court have to enforce or avoid dispute resolution mechanisms and their outcomes? How does the Supreme Court continue to define and modify the enforcement of arbitration clauses? What ethical obligations inform attorneys in dispute resolution contexts?

Understanding the practice of dispute resolution requires an understanding of the legal contexts in which these processes take place. This book, therefore, offers:

1. Clear, readable, and up-to-date overviews of **important and complex legal doctrines and analytic frameworks**, including:
   - Legal ethics relating to dispute resolution, including those rules governing the role of lawyers in dispute resolution
   - The psychology of negotiators' decision making, the economics of deal structures, and the decision analytic approach to dispute resolution
   - The Uniform Mediation Act and state confidentiality laws
   - The Federal Arbitration Act, federal preemption, contractual challenges to arbitration, and the evolving federal policy favoring arbitration
   - The three primary ADR processes and their relationships to each other and to the courts
   - Court-mandated dispute resolution and its requirements, forms, and limits
2. **Practice** applying legal concepts and analytic frameworks to specific dispute resolution circumstances
3. A **logical organization** that traces the coverage in most survey courses on dispute resolution
4. Liberal use of **visual aids**, diagrams, charts, and conceptual illustrations

Thousands of law students have read and commented on drafts and the first two editions of *Dispute Resolution: Examples and Explanations*. In a range of courses, including ADR, Negotiation, Mediation, Arbitration, and even Civil Procedure, we have offered these materials as a mechanism to enhance our students' understanding of the law. Our students have taught us how to explain the law of dispute resolution, how it works, and why it sometimes doesn't. It is no exaggeration to say that our students helped to write this book. For that reason, we are confident it is tailored to students' interests and needs.

Dispute resolution is a permanent and increasingly important component of legal education and law practice. We hope that you find this book helpful as you study its contours.

Michael Moffitt
Andrea Kupfer Schneider
April 2014

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Contents

CHAPTER 1

An Introduction to Negotiation

§1.1 INTRODUCTION

Most disputants, in most disputes, turn first to some form of negotiation to try to resolve their disputes. Understanding negotiation is, therefore, foundational to understanding almost all forms of consensual dispute resolution. When one attorney calls opposing counsel and tries to secure a commitment on a revised lease term, both attorneys are negotiating. When an insurance adjuster offers a financial settlement in exchange for a release, the adjuster and the policyholder are negotiating. When disputing parties appear before a mediator, they are negotiating (with the assistance of a third party). Disputants routinely communicate with each other, in one form or another, in an effort to persuade the other to take a particular course of action. In other words, they negotiate.

Not all disputes are resolved through negotiation, of course. Most of the court opinions you have read in law school casebooks are the product of disputes that were resolved through litigation. And as you will study in the arbitration sections of this book, an increasing number of disputes are resolved by the pronouncement of a privately hired arbitrator. Still, even in these circumstances, the disputants had an opportunity to resolve some or all of the issues through negotiation. Negotiation is so prevalent today that few disputants arrive at court (or at an arbitration) without having previously attempted to negotiate a settlement.

Though most recognize the prevalence and importance of negotiation in the practice of law, the negotiation process itself is the subject of ongoing examination. Scholars and practitioners alike continue to search for the best ways to describe the dynamics between two or more disputants who seek to persuade each other to some course of action. Compared with some aspects of legal practice, negotiation is relatively unstructured. There are few "rules" — at least not in the same way that there are rules of pleadings, of evidence, or even of professional responsibility. At the same time, some consensus has emerged about the structures underlying legal negotiation.

In this chapter, we outline some of the basic vocabulary, frameworks, and concepts central to negotiation.

§1.2 INTERESTS

Every negotiator enters a negotiation with a set of **interests** — the concerns, fears, desires, and dreams that motivate them at the negotiation table. A party will be happy with a negotiated outcome based, in large measure, on how well it satisfies that party's interests. Interests are the primary currency of negotiation — the things that guide negotiators' decisions — but they are often unspoken or masked. One key to understanding negotiators' actions, therefore, lies in understanding the interests underlying their negotiation decisions.

Negotiators are sometimes unaware of the relevant interests in a negotiation because they focus too heavily on one or both sides' negotiation **positions** (what they say they want), rather than on each side's interests (why they want what they want). A plaintiff might demand "a million dollars" to settle her claim against her former employer. Her position is perfectly clear: One million dollars from her former employer will settle her claim. Without knowing more about the plaintiff, however, we cannot know for certain what her underlying interests might be. Having financial security for retirement? Having a face-saving story to tell her family? Removing roadblocks to her future career development? Restoring her reputation among her former colleagues? Covering short-term expenses? Punishing the company for what she perceived to be despicable treatment?

If this plaintiff's attorney fails to ask enough questions to understand her client's true motivations — her interests — the attorney will be constrained to seek only one type of settlement: one that produces a million dollars. As a result, the attorney will be negotiating without some very important information. (Is it possible to satisfy the client with a settlement that includes different terms? Is the client indifferent to the payment form? Does the client care about the scope of the release? Is the client operating within important time constraints?) For similar reasons, even counsel for the defendant would