

EXAMPLES & EXPLANATIONS

Dispute Resolution

Third Edition

Michael L. Moffitt

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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

Summary of Contents

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xix</i>
Chapter 1 An Introduction to Negotiation	1
Chapter 2 The Law of Negotiation	21
Chapter 3 Decision Making in Negotiation	61
Chapter 4 An Introduction to Mediation	83
Chapter 5 Keeping Secrets: Confidentiality in Mediation	117
Chapter 6 Dispute Resolution Within the Court System	139
Chapter 7 An Introduction to Arbitration	165
Chapter 8 Must This Dispute Go to Arbitration?	199
Chapter 9 Federal Preemption and the Law(s) of Arbitration	247
Chapter 10 Attorneys, Clients, and Dispute Resolution	267
<i>Appendix 1</i> The Uniform Mediation Act	291
<i>Appendix 2</i> The Model Standards of Conduct for Mediators	299
<i>Appendix 3</i> The Federal Arbitration Act	307
<i>Table of Authorities</i>	315
<i>Index</i>	319

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?

Preface

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
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Contents

<i>Preface</i>	xvii
<i>Acknowledgments</i>	xix

Chapter I An Introduction to Negotiation I

§1.1	Introduction	1
§1.2	Interests	2
§1.3	BATNA	3
§1.4	Bottom Lines (and Reservation Values)	4
§1.5	ZOPA	6
§1.6	Options and the Opportunity for Value Creation	6
§1.6.1	Shared Interests	7
§1.6.2	Economies of Scale	8
§1.6.3	Differences (in Risk Preference, Predictions, Time Frame, Resources and Capabilities, and Priorities)	8
§1.7	Models of Negotiation	10

Chapter 2 The Law of Negotiation 21

§2.1	Introduction	21
§2.2	Why “Good Faith” Is Not (Necessarily) the Answer	22
§2.3	Fraud	25
§2.3.1	When a Lie Isn’t a Lie	25
§2.3.1.1	Knowing	26
§2.3.1.2	Misrepresentation	27
§2.3.2	When It Might Be a Lie but Isn’t Punishable	27
§2.3.3	Materiality	27
§2.3.4	Puffery, Dissembling, and Misdirection	28
§2.3.5	Detrimental Reliance	31
§2.3.6	When a Lie Is a Lie and Is Punishable: Fraud	32
§2.3.7	When Silence Won’t Save You	33
§2.3.7.1	Omission	33
§2.3.7.2	Duty to Correct	36

Contents

§2.3.7.3	When Silence Is Required (a Note on Client Confidentiality)	37
§2.3.8	What Happens to Liars?	38
§2.4	Misbehavior Beyond Lying	39
§2.5	Protecting the Confidentiality of What Was Agreed to	41
§2.5.1	Hiding Settlement Terms from the Government	42
§2.5.2	Hiding Settlement Terms from Interested Parties in Related Disputes	44
§2.5.3	Hiding Settlement Terms from the Media, the Public, and Other Busybodies	46
Chapter 3	Decision Making in Negotiation	61
§3.1	Introduction	61
§3.2	Psychological Dynamics in Negotiation	62
§3.2.1	Endowment Effects	62
§3.2.2	Loss Aversion	62
§3.2.3	Anchoring	63
§3.2.4	Overconfidence Bias	63
§3.2.5	Zero-Sum Bias or Mythical Fixed-Pie Bias	63
§3.2.6	Reactive Devaluation	64
§3.3	Decision Analysis	64
§3.3.1	Building a Decision Tree	65
§3.3.2	The Limits of Decision Analysis	68
§3.4	Time and the Value of Money	69
Chapter 4	An Introduction to Mediation	83
§4.1	Introduction: Definition(s) of Mediation	83
§4.2	Mediators' Approaches or Styles	84
§4.2.1	Facilitative Mediation	85
§4.2.2	Evaluative Mediation	86
§4.2.3	Riskin's Grid: The Potential Relationship Between Facilitative and Evaluative Mediation	87
§4.2.4	Transformative Mediation	89
§4.2.5	Facilitative, Evaluative, and Transformative Basic Logic	90
§4.3	Basic Principles of Mediation	91
§4.3.1	Impartiality (or Neutrality)	92
§4.3.2	Self-Determination	93
§4.3.3	Informed Consent	94
§4.4	Quality Control in Mediation	96
§4.4.1	Certification or Credentialing	97
§4.4.2	Ethics Codes	98
§4.4.3	Private Liability	99

	§4.4.3.1 Immunity	100
	§4.4.3.2 Standards of Care	101
	§4.4.3.3 Causation and Damages	102
Chapter 5	Keeping Secrets: Confidentiality in Mediation	117
§5.1	Introduction	117
§5.2	Evidentiary Exclusions	119
§5.3	Protective Orders: Using the Court to Keep It Secret	121
§5.4	Contracts: I Promise Not to Talk	122
§5.5	Privilege: This Relationship Is Special	123
§5.5.1	Who Holds a Mediation Privilege?	124
§5.5.2	What If I Don't Want the Privilege (or Want to Waive It)?	126
§5.5.3	Are There Any Exceptions to Privileges?	127
Chapter 6	Dispute Resolution Within the Court System	139
§6.1	Introduction	139
§6.2	Why a Court Has the Authority to Order ADR	140
§6.2.1	Rule 16 of the Federal Rules of Civil Procedure	140
§6.2.2	Federal Statutes and Local Rules	141
§6.2.3	The Court's Inherent Powers	141
§6.2.4	State ADR Systems	142
§6.3	What a Court Cannot Compel the Parties to Do	142
§6.3.1	A Court Can't Make Me Settle!	143
§6.3.2	A Court Can't Make Me Make an Offer!	143
§6.3.3	A Court Can't Force the Terms of an Offer (but Can Punish Me If I Turn Down a Good Offer)!	144
§6.4	What a Court Can Compel the Parties to Do	145
§6.4.1	A Court Can Compel a Particular (Nonbinding) Form of ADR	145
§6.4.1.1	Mediation	146
§6.4.1.2	Nonbinding Arbitration	146
§6.4.1.3	Early Neutral Evaluation	147
§6.4.1.4	Summary Jury Trials	147
§6.4.2	A Court Can (but Doesn't Always) Compel Good-Faith Participation	148
§6.4.2.1	What Constitutes Good-Faith Participation?	149

§6.4.2.2	What Happens to Those Who Cross the Line?	153
§6.5	Enforcing Mediated Settlement Agreements	154
Chapter 7	An Introduction to Arbitration	165
§7.1	Introduction	165
§7.1.1	Arbitration Is Not Litigation	167
§7.1.2	Arbitration Is a Contractual Substitute for Litigation	168
§7.1.3	Arbitration Is Not Mediation	169
§7.1.4	Comparing Litigation, Arbitration, and Mediation	171
§7.2	A Brief History of the Law of Arbitration	172
§7.3	Making Them Play: How Courts Compel Participation in Arbitration	174
§7.3.1	Motions to Stay the Litigation	175
§7.3.2	Motions to Compel Arbitration	176
§7.3.3	Defaults in Arbitration	176
§7.3.4	The Preclusive Effects of Arbitral Awards	177
§7.4	Getting Your Way: How Courts Handle Reviews of Arbitrators' Decisions	179
§7.4.1	Challenging Arbitral Awards Under the FAA	179
§7.4.2	Challenging Arbitral Awards on Nonstatutory Grounds	183
§7.5	Making Them Pay: How Courts Enforce Arbitral Awards	185
§7.5.1	Disputes at Home: Entering Arbitral Awards as Judgments	185
§7.5.2	Disputes Without Borders: International Arbitral Awards	186
Chapter 8	Must This Dispute Go to Arbitration?	199
§8.1	Introduction	199
§8.2	What Part of the Arbitration Agreement Is Being Challenged?: The Doctrine of Separability	200
§8.3	Who Decides Contractual Challenges?	201
§8.3.1	Challenges to the Container Agreement	201
§8.3.2	Challenges to the Arbitration Clause Specifically	203
§8.3.3	Challenges to the Delegation Clause Specifically	203
§8.4	Objection #1: "What Contract? I Never Agreed to Arbitrate Anything."	204

Contents

§8.4.1	Mutual Assent	205
§8.4.2	Consideration	206
§8.4.3	Capacity, Authority, and Legality	207
§8.5	Objection #2: “Yes, I signed a contract with an Arbitration clause, but the contract isn’t enforceable”	208
§8.5.1	Fraud	209
§8.5.2	“Public Policy” Objections	209
§8.5.3	Duress	212
§8.5.4	Unconscionability	212
§8.6	Objection #3: “The Arbitration clause itself is unenforceable”	216
§8.7	Objection #4: “This particular dispute does not fall within the scope of the arbitration clause”	218
§8.7.1	Standards for Deciding If a Dispute Is Substantively Arbitrable	219
§8.7.2	Who Decides Whether a Dispute Is Substantively Arbitrable?	220
§8.8	Objection #5: “They didn’t do what the Arbitration agreement requires them to do”	222
§8.8.1	Standards for Deciding If Conditions Precedent to Arbitration Have Been Satisfied	223
§8.8.2	Who Decides Whether a Dispute Is Procedurally Arbitrable?	224
§8.9	The Special Case of Class-wide Claims	224
§8.10	Pulling It All Together & A Preview of the Preemption Doctrine	226

Chapter 9 Federal Preemption and the Law(s) of Arbitration 247

§9.1	Introduction	247
§9.2	Some Background on the Preemption Doctrine	248
§9.3	Federal Arbitration Law as Substantive Law	249
§9.4	Five Categories of State Laws Related to Arbitration	250
§9.4.1	State Laws Affecting All Contracts	251
§9.4.2	State Laws Enforcing Arbitration Clauses	251
§9.4.3	State Laws Enforcing Arbitration Clauses, but Only with Some Modifications or Restrictions	252
§9.4.4	State Laws Disfavoring Arbitration Clauses and Some Other Subset of Contracts	253
§9.4.5	State Laws Disfavoring Only Arbitration Clauses	255

Contents

§9.5	What if the Parties Specifically Choose to have State Law Govern the Question?	256
§9.5.1	If the Parties Specify State Law Only as to Substance	257
§9.5.2	If the Parties Specify State Law as to Arbitration	257
§9.5.3	If the Parties' Choice of Law Provision Is Ambiguous About the Scope of Its Coverage	258

Chapter 10 Attorneys, Clients, and Dispute Resolution 267

§10.1	Introduction	267
§10.2	The Duty to Advise a Client of ADR Options	268
§10.2.1	I Don't Have to Say a Thing	270
§10.2.2	I Should Advise My Client About ADR	270
§10.2.3	I Must Advise My Client About ADR	271
§10.2.4	I Must Advise My Client and Discuss with Opposing Party or Counsel	272
§10.2.5	Sanctions	273
§10.3	Duty to Communicate Settlement Offers	274
§10.3.1	Do I Have to Tell My Client About Every Offer?	274
§10.3.2	Does It Matter If the Other Side's Offer Is Terrible?	275
§10.3.3	Does This Mean That the Client Can't Give Me Discretion?	276
§10.3.4	Do I Have to Convey My Client's Settlement Offer If I Think the Offer Is Unwise?	277
§10.4	Client Confidences	278
§10.4.1	Can a Lawyer Sit Quietly in a Negotiation While a Client Commits Fraud?	279
§10.4.2	Can a Lawyer Help a Client Deceive an Arbitrator?	280
§10.4.3	Can a Lawyer Help a Client Deceive a Mediator?	281
§10.4.4	Can a Lawyer Disclose Confidential Information in a Mediation, Since Mediation Is a Confidential Process?	282

Appendix 1	The Uniform Mediation Act	291
Appendix 2	The Model Standards of Conduct for Mediators	299
Appendix 3	The Federal Arbitration Act	307
Table of Authorities		315
Index		319

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.

I. An Introduction to Negotiation

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