

OXFORD



MEDIATION REPRESENTATION

SECOND EDITION

HAROLD I. ABRAMSON

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Professor of Law, Touro Law Center, New York



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Revised Oxford University Press Edition

My short journey between the second edition and this Oxford edition concentrated on tailoring and editing the book to meet the needs of mediation advocates outside North America. I want to acknowledge the warm and helpful assistance from both the anonymous European peer reviewers and the European lawyers that so graciously responded to my inquiries about various ways to modify this edition. I want to specifically thank Ronnie Austin and the attorneys from Clifford Chance, Thierry Garby, Michel Kallepitis, Jeremy Lack, Alan Limbury, Karl Mackie and the staff of CEDR, Chris Newmark, Manon Schonewille, and John Sturrock.

I also want to thank Vicky Pittman at Oxford University Press who professionally, patiently and persistently guided me during the journey that produced this edition.

Second Edition

My educational journey in mediation representation that produced the first edition in 2004, and was chronicled in that edition, has continued for another five illuminating years. Numerous people and organizations gave me extraordinary opportunities to delve broader and deeper into a field that is steadily moving toward maturity. I owe them deep gratitude for the opportunities they gave me to learn, research, test materials in a variety of settings, including cross-cultural ones, publish articles, and solidify new materials for this edition.

First, I must acknowledge the early and much appreciated encouragement from the CPR International Institute for Conflict Prevention and Resolution when it gave the first edition of this text its 2004 book award. It signaled that I was on the right track.

When the first edition was still at the publisher, I turned to a prior commitment to prepare a textbook on international dispute resolution. As the research progressed, I realized that the mediation representation framework for the first edition was embedded with Western values that needed to be highlighted. That led me to modifying the framework to form a culturally neutral one that now forms the foundation for this second edition. I benefited greatly from the feedback from my two co-authors, Professor Jacqueline Nolan-Haley at Fordham

University School of Law and Pat Chew at University of Pittsburgh School of Law. The result was *International Conflict Resolution: Consensual ADR Processes* (West 2005).

In fall 2005, the ICC (International Chamber of Commerce) in Paris contacted me about helping them develop an international version of the ABA (American Bar Association) mediation representation competition for US law students. I had already served as Chair of the ABA committee that developed its judging rules. When serving on the ICC planning committee, I had to consider how to adapt the ABA rules to serve the needs of the ICC's first annual global competition. That effort required me to reflect on the best international practices for mediation advocacy, practices that would form the basis for judging the advocacy of participants from around the globe.

Then the ICC gave me the opportunity to mediate and judge in every annual competition since the first one in January 2006 and, as result, I was able to observe and discuss practices with coaches and teams from throughout the world. And at the second annual competition in February 2007, the student team from the National Law School in Bangalore, India, gave me the unexpected privilege of coaching them. The talented team of Parag Sayta and Vikas N M had progressed to the quarter finals without a coach. For the final two days of the competition, I assisted them and experienced up close their culturally shaped approach to preparing and participating in the mediations. They progressed to the final round.

Next, I began a series of projects to convert the ideas in the first edition into PowerPoint presentations and exercises for training lawyers. After teaching mediation advocacy courses and lecturing to lawyers for more than ten years, it was time to shape the materials into a discrete 1–3-day training program for practising lawyers.

One of my early opportunities came from Lonny Rose, the Chief Executive Officer of National Institute for Trial Advocacy (NITA), who was determined to move NITA into training mediation advocates. He asked me to design a programme and teamed me up with experienced NITA trainers, including Judge Nancy Vaidik and Peter Hoffman. In April 2006, NITA invited twelve hand-picked, experienced attorneys from around the US to participate in a pilot programme. They served both as guinea pigs and critics who gave feedback after each segment of the two-day training program. Based on the feedback, the materials were modified and refined to become the basis for NITA's mediation advocacy training program.

My next exceptional opportunity came in August 2006 when Deborah Masucci, Vice President of Dispute Resolution, Litigation Management at AIG (now called Chartis) asked me and long-term friend and colleague Steve Younger to design a training programme. Steve Younger is a partner at Patterson Belknap Webb & Tyler with deep experience as an advocate in mediation and as a mediator. Debbie wanted to develop a comprehensive, national mediation advocacy

training programme for all of AIG's in-house attorneys. She formulated a creative approach to internalize the substance and values of effective mediation advocacy. Instead of using outside trainers to train all the attorneys, she wanted consultants to design an internal program where senior in-house attorneys from around the country would train attorneys regionally. Debbie secured the critical approval of Terry Williams, Senior Vice President, Staff Counsel Executive, whose commitment ensured follow through and full participation of his staff.

Over a two-year period, Debbie, Steve, and I surveyed extensively the in-house attorneys, designed two customized pilot programs that took into account the substantial mediation experience of many of the trainees, trained 20 in-house senior attorneys in the materials and how to deliver trainings, and prepared two lengthy and comprehensive manuals for the trainers to implement intermediate and advanced mediation advocacy training programs. The in-house trainers delivered the materials regionally to over 200 attorneys, and I was given the extraordinary opportunity to learn much not only about how to customize training programs, but also the distinctive training needs of the insurance industry. I am indebted to Debbie for giving me the opportunity to do this and to work with her and Steve.

I also had numerous other opportunities to design and refine materials in training programmes and courses in the US and abroad, along with presenting in many continuing education programmes. I learned much from the inquisitive and experienced participants.

The trainings in the US included ones for the New Mexico State Court System (that was piloted by two far-sighted and determined state officials, David Levin and Celia Ludi), Federal Court in New Hampshire (piloted by the consummate professional, Dan Lynch), Federal Court in Eastern District Court of New York (piloted by two creative leaders, Judge Robert Levy and ADR administrator Jerry Lepp), Minnesota State Bar Association, the Federal Bar Council for the Second Circuit, the NYC Bar Association, and two large law firms.

I also further refined the materials abroad in one-day training programmes in Geneva (piloted by the persistently creative Jeremy Lack) and the Netherlands (piloted by one of the reflective senior leaders of the field in Europe, John Bosnak), and in courses in China, Berlin, and Italy, including teaching jointly a course in Rome with one of the few other scholars in international mediation, the innovative Professor Nadja Alexander from Australia.

I also was given the rich opportunity to learn from others outside the US when attending several invitation-only global conferences and consulting with experts, who are now friends, from China, Japan, and Turkey.

I benefitted greatly from attending the Autumn 2007 Rome MEDA conference organized by Giuseppe DePalo, where he convened leaders from his European Union-funded, three-year project to promote and develop ADR programmes in ten MEDA countries (Northern Africa and the Middle East). At the Second

Generation Negotiation Conference in Rome in May 2008, organized by Hamline Law School (Jim Coben, Giuseppe DePalo, and Chris Honeyman), I had the unusual opportunity to observe superb trainers train and then publish an article, *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, published in 9 Pepperdine Dispute Resolution Law Journal 437 (2009) and *Rethinking Negotiation Teaching* (Editors, James Coben, Giuseppe DePalo, and Christopher Honeyman, Hamline University 2009). And then I participated in an international dialogue at the International Mediation Leadership Summit at The Hague, organized by the ABA Section on Dispute Resolution in October 2008.

Since the first edition, I have had a chance to delve deeply into mediation practices of one other country in particular, China. During my three visits to China to teach, lecture, and meet with experts in dispute resolution, I benefited from lengthy get-togethers with some of the thoughtful leaders in China including Wang Hongson, Chair, Beijing Arbitration Commission and Cheng Hui, Vice Secretary General, CCPIT/CCOIC Mediation Center, Beijing, as well as an impressive young and insightful scholar, Andrew Lee at Beijing University, and a reflective practitioner, Lijun Cao, CIETAC Deputy Director of Foreign-Related Business Department (administering arbitrations), arbitrator and Guest Professor, Beijing University of Foreign Studies, Arbitration Law and Practice.

My first meeting with Lijun Cao in June 2006 turned into an extended and informative collaboration where we explored the differences between Chinese and US mediation practices. After developing a list of over a dozen topics, we explored each one during ten telephone calls and one all-day meeting for a total of about 24 hours. We discussed practices in China, practices in the US, and then compared and contrasted them. We completed a full discussion and a detailed outline.

I also must acknowledge the invaluable assistance of Aaron Halegua, who seemed to know everybody involved with mediation in China. We met when he had just graduated from Brown University and was studying mediation in China with funding from a Fulbright scholarship.

I also learned much about Japan from Professor Yoshi Wada, Waseda University, Tokyo, during several meals and meetings. He is studying the emergence of Westernized style mediation in Japan and how it is being adapted.

And, I had a chance to spend time in Turkey when mediation was starting to take hold due to new Turkish laws. During my three trips to Turkey I lectured for Professor Feridun Yenisey at Bahcesehir University, Istanbul, who taught me about some of the challenges of implementing mediation programs in Turkey and spent time with Deniz Kite, a pioneer in Turkish mediation, including conducting a one-day advanced mediation training programme for her.

I also want to thank several people who enticed me to write articles that helped inform the second edition.

Louis Buchman in Paris gave my name to a new European ADR publication that wanted an article relevant to developments in Europe. Because the European Union was starting to form a mediation infrastructure, I conducted a study of mediation rules around the globe. The project resulted in the article, *Mining Mediation Rules for Representation Opportunities and Obstacles*, 1 J. of Intl. Dis. Res. 40 (Germany 2004) and 15 Am. Rev. of Intl. Arb. 103 (Sp. 2005).

Professor Andrea Schneider invited me along with dozens of other people to contribute to her book with Chris Honeyman, *The Negotiator's Fieldbook*. She was interested in something on the use of mediation in cross-cultural negotiations. As a result, I wrote an article about selecting mediators in cross-cultural disputes—'The Culturally Suitable Mediator' in Schneider and Honeyman, *The Negotiator's Fieldbook* (ABA 2006) and an expanded version entitled 'Selecting Mediators and Representing Clients in Cross-Cultural Disputes', 7 Cardozo J. of Confl. Resol. 253 (2006).

Professors Ellen Waldman and Kimberlee Kovach pressured me to learn about ethical issues encountered in international mediations. ADR ethics has not been an area that I had studied in any depth, leaving that for others. Ellen convinced me to write a chapter for her upcoming book on ADR ethics, and Kim convinced me to contribute to an ethics symposium at South Texas Law School. For months, I had to read and agonize about how Westernized ethical principles might apply in cross-cultural settings. Thanks to them, I learned about distinctively international ethical issues and produced an article entitled, 'Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally', 49 S. Tex. L.R. 921 (2008)(ADR Ethics Symposium Issue).

I want to acknowledge with great appreciation IAM (International Academy of Mediators) for permitting me to post questions on its members-only online discussion group in spring 2009. I inquired about caucusing practices and sharing information in mediations. I want to especially thank the following participants for their insightful and valuable comments that helped inform my thinking: Tracy Allen, Eleanor Barr, Paul Bent, Cliff Hendler, Eric Galton, Jeff Jury, Michael Landrum, Gene Moscovitch, Bennet Picker, and David Plant.

Finally, I want to give special thanks to six individuals and good friends who gave generously their precious time and offered invaluable insights whenever I would badger them with questions and solicit feedback. They are John Barkai (University of Hawaii), John Bosnak (Netherlands), Cliff Hendler (Toronto), Jeremy Lack (Switzerland), Lela Love (Cardozo Law School, NYC, and team-teacher), and Ellen Waldman (Thomas Jefferson Law School, San Diego).

Through this persistent study and testing of ideas and approaches, the second edition emerged. I deeply appreciate all the indispensable help along the way, although I remain solely responsible for the final product.

This book would never have come to fruition without the essential and generous support from Touro Law Center, especially from Dean Larry Raful who gave

me sabbatical time, summer research grants, and flexibility in course scheduling to work on this project. I also appreciated the support given by Vice Deans Gary Shaw and Louise Harmon, including Louise's severe editing of the introduction.

And this project benefited greatly from the valuable assistance of my talented research assistant of two years, Lena Davydan, who welcomed and overcame every research challenge, and Bernadette Safrath, who so thoroughly and efficiently handled every last-minute assignment as the book came together, including researching fine points, professionally and proficiently editing and formatting all the footnotes, and managing the tedious and critical process of securing copyright approvals.

I also want to specially acknowledge and thank Martha Broderick for her generous encouragement and support during the writing of this edition.

This book was brought to conclusion by the wonderful and professional staff of NITA. I am thankful for the careful, patient, and thoughtful editing of Darla Upchurch and the creative design and marketing expertise of Amy Rinehart, Anna Schmöhe, and the renowned publications guide to law professors, Jeanne Philotoff.

First Edition

This book culminates a decade of researching, developing, and testing approaches to mediation representation in a variety of demanding settings inside the classroom, in continuing legal education and training programmes, as well as in mediations. These settings were filled with inquiring students, seasoned and sometimes cynical litigators, and experienced and talented mediation advocates. I owe all these anonymous teachers a deep debt of gratitude for permitting me to learn from them.

My mediation representation journey began in January 1994, when Norman Itzkoff, Cathy Cronin-Harris, Steve Younger, and I got together to design a programme on mediation representation for the annual meeting of the New York State Bar Association. Planning this programme with these thoughtful colleagues impelled me to prepare my first public thoughts on the subject and propelled me to focus on it in depth.

Thereafter, I began researching, interviewing experienced attorneys, and evaluating approaches to effective advocacy in mediation. I initially turned to the law students in the course I teach on dispute resolution. These students became involuntary subjects for testing concepts, ideas, and materials. As I experimented on my students, I was fortunate to be offered many opportunities in continuing legal education programmes to present ideas to academics and practising attorneys and to learn from their reactions. These programmes included a workshop, sponsored by the Association of American Law Schools' 2002 conference, for law faculty on

how to teach mediation representation, and two intensive half-day training programmes that I was asked to design, one for the Commercial and Federal Litigation Section and Corporate Counsel Section of the NYS Bar Association in 1999 and another for the Nassau County Bar Association in 2001. I also observed numerous advocates in the legal cases that I mediated.

As I continued my research, I was helped along the way by many people whom I want to specially acknowledge and thank.

Scott Hughes and Andrea Schneider, the organizers of the ABA Mediation Representation Competition, gave me an unexpected and welcomed gift when they asked me to chair a new Mediation Representation Rules Committee. I had just finished hosting the first New York regional competition for the ABA Spring 1999 Competition. They wanted to form a committee to examine the criteria for evaluating participants in the competition and to consider whether the criteria that were being utilized needed to be revised or replaced.

They gave me the opportunity to participate in a bedazzling one-year seminar with many of the leading thinkers in the field. The committee included Beryl Blaustone, Jim Coben, Eric Galton, John Lande, Lisa Lance, Jackie Nolan-Haley, as well as Scott Hughes and Andrea Schneider. During 2000–01, we debated and explored what were good mediation representation practices and drafted a completely new set of judging criteria based on a problem-solving approach to representation, the approach that informs this book. The new criteria have been used since 2001 in the national mediation representation competitions that continue to grow. In 2003, the competition took place in nine regions, attracting teams from almost 50 law schools throughout the US, leading to a national final competition at the annual meeting of the ABA Section of Dispute Resolution.

Lela Love asked me to team-teach a course with her on mediation representation at Cardozo Law School. I had previously developed a substantial mediation representation segment for my ADR course at Touro. She now presented the opportunity to delve deeper into the subject by collaborating on designing a separate mediation representation course. Since January 2001, Cardozo has offered our course as an alternative to the semester break intensive trial advocacy course.

Gerald Lepp, ADR Administrator, and Magistrate Judge Robert Levy, the judge overseeing the ADR programmes in the US District Court, Eastern District of New York, invited me to informally counsel the court-annexed mediation programme on training advocates and mediators. Their invitation offered me a rich opportunity to learn from and test approaches with an exceptionally demanding audience—New York litigators. I designed and conducted a one-day training programme in 2001 for about 150 experienced litigators turned mediators on how to convert adversarial advocates in the mediation into problem-solvers. I also designed and conducted several half-day and full-day training programmes for the litigators in the NYC Department of Law, a frequent participant in federal court mediations.

A number of people contributed their precious time and considerable expertise to commenting on segments of the book. I received valuable feedback on sections from James Coben, Ken Fox, Dwight Golann, Elayne Greenberg, Russell Korobkin, John Lande, Jackie Nolan-Haley, Christopher Moore, Andrea Schneider, and Barbara Swartz.

Wayne Outten, an outstanding and active mediation advocate who has thought deeply and reflectively on what constitutes good representation practices, generously reviewed and commented on a number of chapters.

It is through this rigorous and, at times, brutal screening of ideas and approaches that this book has survived, a book that develops a coherent approach to representing clients in mediation as a problem-solving process. Of course, I remain solely responsible for the final product.

This book would never have come to fruition without the essential and generous support from Touro Law Center, especially from Dean Howard Glickstein, who gave me sabbatical time, summer research grants, and flexibility in course scheduling to work on this project. I also appreciated the support given by Vice Deans Eileen Kaufman and Gary Shaw.

I benefited greatly from our all-purpose Associate Dean Ken Rosenblum, who reviewed chapters for clarity from the point of view of an attorney with no formal training and experience in mediation, and who was able to quickly locate talented law students for me whenever I needed assistance.

And finally, this project benefited from the valuable assistance of a number of particularly dedicated Touro law students, including Jonathan Kirchner, Maryam Jadali, and Jianhua Zhong, as well as Nichoel Forrett who so professionally and efficiently edited and formatted all the footnotes.

This book was brought to conclusion by the wonderful and professional staff of NITA. I am thankful for the careful, patient, and thoughtful editing of Ashley Smith and the creative design and marketing expertise of Kathy Pitts, Jeanne Philottoff, and Jude Phillips.

ABOUT THE AUTHOR

Professor Harold (Hal) Abramson is a full-time faculty member at Touro Law Center, New York, where he teaches, trains, and writes on how attorneys can effectively represent clients in domestic and international mediations and how mediators resolve intercultural disputes. He is an experienced domestic and international commercial mediator and has taught or trained throughout the US as well as in China, France, Germany, Hong Kong, Hungary, Italy, India, Israel, Netherlands, Russia, Singapore, Switzerland, and Turkey. He served as Chair of the ABA Committee that drafted its mediation representation competition rules and assisted the ICC in Paris in launching its international mediation representation competition. He currently serves as co-chair of the IMI Task Force in The Hague that is designing an Inter-Cultural Mediator Certification Program. Abramson's numerous publications include two books, *Mediation Representation—Advocating as a Problem-Solver in Any Country or Culture* (NITA 2010, Recipient of CPR 2004 Book Award) and *International Conflict Resolution—ADR Consensual Processes* (co-Authored). For a more detailed biography, see <www.tourolaw.edu/faculty/abramson>.

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