

DISPUTE RESOLUTION AND LAWYERS

Abridged Edition

AMERICAN CASEBOOK SERIES

**LEONARD L. RISKIN
JAMES E. WESTBROOK**



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DISPUTE RESOLUTION AND LAWYERS

Abridged Edition

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AMERICAN CASEBOOK SERIES

*This book is an abridgement of Riskin and Westbrook's,
"Dispute Resolution and Lawyers".*



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To
Casey and Andrew
and
Kay, Mike, Bruce, and David

*

Preface to the Abridged Edition

This is a shorter, less expensive version of the first edition, prepared mainly for use as a supplement in standard first year and other law school courses.

We retained the first edition's structure, and faced painful choices about what to cut. Although we did some editing, we tended to remove entire readings, and usually referred to them in new notes. Our razor was guided by a wish to emphasize the essentials of the basic and mixed processes and how to interview and counsel clients and to build and choose dispute resolution processes. Accordingly, we dropped a few of the case studies and other direct descriptions of dispute resolution in action, as well as some of the more philosophical writings. We fear we may have removed, not just a lot of the words, but some of the music as well. We commend the original edition to readers who share this concern or who otherwise desire fuller treatment of some of the issues.

We are grateful to Lewis Barr, UMC School of Law '88, for his help in preparing the index.

L.L.R.
J.E.W.

Columbia, Missouri
October, 1987

*

Preface to the Unabridged Edition

Lawyers need to know more about alternative means to prevent and resolve disputes, for their own good as well as for their clients and society. Practicing lawyers advise clients about how to deal with disputes and help carry out some dispute resolution processes. But lawyers do more than represent clients. Serving in many capacities, they become architects and engineers of dispute resolution methods. They become judges, legislators, and heads of government agencies. They serve on committees of bar associations and community groups and as advisors to every conceivable public and private enterprise. Accordingly, it is important that law students begin to see dispute resolution from many perspectives in addition to that of the lawyer serving an individual client. Such perspectives, and the issues they confront, are presented in these pages and in the accompanying Instructor's Manual.

This book will serve at least two audiences—lawyers and law students. For the lawyer, the book provides a general introduction to interviewing and counseling, negotiation, mediation, arbitration, “mixed processes,” and choosing or building a dispute resolution process. In addition, it covers many of the policy issues raised by increased use of such alternative methods.

The lawyer's principal job is to help clients solve problems, and advocacy skills are simply one of several important techniques to accomplish that. Most lawyers spend much of their time interviewing, counseling, and negotiating, three tasks to which we devote substantial attention in these pages. Most have little formal training in these tasks and have reflected little on how to conduct them. Most lawyers have even less familiarity with the other processes covered in this book—mediation, arbitration, mixed processes—and with the ways to choose or build a dispute resolution process. As a result, many clients who could benefit from such processes do not have ready opportunities to do so.

Our objective in this book is not to promote blindly the alternatives to traditional litigation. Instead, we wish the reader to understand better all major dispute resolution processes, including litigation. We want to convey the essential nature of the basic processes and new combinations of these processes, their advantages and disadvantages, and the issues of policy, professional responsibility, and role raised by their use.

The book has several uses in law schools. We have used it to teach survey courses on Dispute Resolution and to teach a course on Negotia-

tion and Mediation. Plainly, it would work well for other courses covering special aspects of dispute resolution. The book also can be used as a supplementary text in many advanced and first year courses.

In fact, we prepared the book as part of a project that integrated dispute processing into all first-year courses at the University of Missouri-Columbia (UMC) School of Law. We chose to integrate dispute processing into required first-year courses rather than to rely exclusively on separate courses, as some law schools have. The knowledge, perspectives, and skills we present in this book are central to the work of the modern lawyer. Accordingly, it is important that dispute processing be taught pervasively and during the first year, when the professionalization process is at its height. We wish to expose students to dispute resolution knowledge, perspectives, and skills, at the time they are beginning to decide how to live their professional lives. We hope this will counteract the assumption—so common in law schools and so remote from reality—that most disputes are resolved through judicial proceedings or at least pursuant to a rule of law.

Although we are integrating dispute processing into all first-year courses at UMC, this book will be equally useful at law schools where only some teachers of first-year courses wish to teach dispute processing. The book and Instructor's Manual are arranged so that instruction on any given topic, perspective or skill can be offered in nearly any course. For example, at the UMC School of Law we teach interviewing in Property; we give an overview of dispute resolution and teach mediation in Civil Procedure; and we teach aspects of negotiation in all our first-year courses. At another school, other approaches are possible. For instance, the Contracts teacher could cover all or any part of the material that we disperse across the entire first year at UMC. Or the information could be divided among any number of first-year courses. We are preparing an abridged, paperback version of this book for instructors who would like to provide less extensive coverage at a lower price.

The Instructor's Manual includes 35 exercises and problems developed by 24 professors at 14 law schools. With one exception, these exercises and problems may be used both in separate Dispute Resolution courses and at various points in basic first year courses. Most of the exercises are designed to help teach the substance of the course, as well as dispute resolution. Outside the first year courses, the professor would place less emphasis on the relevant law and more on the dispute resolution processes.

The book can be used profitably with a variety of teaching goals and techniques. The essence and variety of alternative processes cannot, however, be conveyed through readings, lectures, or discussions alone. Experience is required to understand some processes, such as negotiation and mediation, and simulations can provide this. The Instructor's Manual contains many exercises that expose students to the skills of interviewing, counseling, negotiation, and mediation. The

skills associated with adjudication, including arbitration, receive less emphasis because standard courses already cover these adequately, but we do stress the uses of arbitration and the law relating to it.

The problems and exercises can facilitate, even enhance, learning about legal doctrine and the characteristics of traditional adversarial processes. These materials can be used to achieve the same objectives as the Socratic dialogue, which we prize partly because it resembles a colloquy between judge and lawyer and helps students learn law. By the same token, a negotiation exercise can be used to teach not only negotiation strategies, tactics, and techniques, but also "the law" on a given point. By confronting "the law" in simulated negotiation or counseling sessions, students can appreciate the diverse contexts in which law is encountered, the uncertainty in law, and the circumstances in which judicial remedies may be inadequate or inappropriate—or when they may be most suitable. These insights can enrich students' understanding of the role of law.

The book has seven chapters. Chapter I provides an overview of dispute processing and its relevance to lawyers' roles. Chapter II sets out basic information about Interviewing and Counseling, which are crucial in helping clients choose an appropriate approach to their dispute. In addition, interviewing and counseling are important parts of negotiation and mediation. Chapters III, IV, and V deal, respectively, with Negotiation, Mediation, and Arbitration. Chapter VI considers "Mixed Processes," such as the "mini-trial" and the summary jury trial, which combine aspects of the basic dispute resolution methods. Finally, Chapter VII discusses how to choose or build a dispute resolution process.

Our objectives are modest. We do not expect this book to give students comprehensive knowledge or proficiency in any of the methods of dispute resolution. We do want students to get a good introduction to these methods, a nodding acquaintance and more, upon which they can build in other courses and in their careers. And we have the same goals for lawyers and others who may read this book.

We have inserted three asterisks (* * *) to indicate omissions in reprinted material. However, we have omitted footnotes, parenthetical references to authorities, and some citations to cases and statutes without so indicating. In the few instances where we retained footnotes, we kept their original numbering. Letters designate footnotes added to reprinted materials by the authors of this book. Footnotes within text prepared by the authors of this book are identified by numbers.

To avoid awkward language, we use either masculine or feminine pronouns to include their opposites.

We are grateful to many people who helped us develop this book and the Instructor's Manual. The concept for the project was developed at a Fall, 1984 meeting of the Internal Advisory Committee for the

then newly formed Center for the Study of Dispute Resolution. It was attended by the authors as well as by Dean Dale Whitman, Professors Timothy J. Heinsz, and Joan M. Krauskopf and Christine Nelson, '86, all of whom contributed to the synergy of the day. Within a short time, all the teachers of basic first year courses at UMC Law School joined in with good, and sometimes great, enthusiasm. We are enormously grateful to all of them—Bill Henning, George Wallach, Nanette Laughrey, Carl Esbeck, Ed Hunvald, Bill Knox, Dale Whitman, Grant Nelson, David Fischer, Joan Krauskopf, and Mike Middleton, and to Nic Terry who, while visiting here during 1986–87, also contributed significantly to this project. This project would not have been possible without Dean Dale Whitman's leadership, the entire faculty's support, and the indulgent understanding of the curriculum committee chaired by Bill Fisch.

Carrie Menkel-Meadow, of the University of California-Los Angeles Law School, has been an important source of both constructive criticism and support since the early days of the project. During the first year of the project, she conducted a workshop on negotiation for UMC law faculty. Professor Eric Green, of Boston University, conducted a similar workshop on alternative dispute resolution. Both these events were crucial to the project's development. Bea Moulton, of the University of California-Hastings College of Law, helped enormously in reading, criticizing and making suggestions about Chapters I, II, III, and IV. Frank Sander, of Harvard Law School, made many helpful suggestions on Chapter III. Our colleagues, Tim Heinsz and Bill Henning, gave us thoughtful commentary on Chapter V. Jim Devine was a steady source of assistance on issues of professional responsibility. Ann Domeck, of the UMC Graduate School, was especially helpful in making fine editorial suggestions. We are deeply grateful to all these people. And, of course, we take responsibility for the final decisions.

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The staff of UMC's law library was endlessly responsive to our requests for materials, and we thank them.

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And finally, we thank our families for their loving support and encouragement.

L.L.R.
J.E.W.

Columbia, Missouri
May, 1987

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