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Resolving Disputes
Theory, Practice, and Law

Second Edition

Jay Folberg

Professor and Former Dean
University of San Francisco Law School

Dwight Golann

Professor
Suffolk University Law School

Thomas J. Stipanowich

Academic Director, Straus Institute for Dispute Resolution and Professor
Pepperdine University School of Law

Lisa A Kloppenberg

Professor and Dean
University of Dayton School of Law



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PREFACE

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 than as professional neutrals. Finally, a text on dispute resolution should be interesting to read and should bring together the latest and best writing on the use and limits of alternative dispute resolution (ADR).

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 for someone negotiating for themselves or serving as a neutral. The text is practical, while grounded in theory. The material is lawyer focused, 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. Ample 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 issues, ethics, and law.

The negotiation section starts with the nature of conflict, the role of perceptions 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 decision analysis and the use of computer software.

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 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 arbitration materials we depart from the traditional emphasis on case decisions, while covering comprehensively the basics of arbitration for lawyers. 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 an agreement to arbitrate and advocating on their behalf. Concerns about the fairness of mandatory arbitration and other recent developments are also considered. The most important aspect of this second edition is the inclusion of additional discussion problems, procedural practicalities, innovations and updates.

The book concludes with a synthesis of conflict management approaches. We review popular court-annexed options as well as corporate and governmental programs using hybrid combinations of negotiation, mediation, and/or arbitration. We preview emerging issues in conflict resolution, including systems design work, online dispute resolution and collaborative law. Finally, we present evolving opportunities for lawyers to become problem solvers for their clients and communities, calling on leaders from Abraham Lincoln to modern judges to inspire readers.

This new edition builds on the First Edition and benefits from the comments of many professors who have adopted it. This edition is updated with the most recent writings on ADR so teachers will not need to prepare supplements in order to assign entirely up-to-date material. Readings have been carefully selected and edited to keep the material interesting and lively. We also take advantage of technology, and of students' increasing preference for electronic and video formats. Items that have traditionally gone into a paper appendix now appear on the book's web site, including a bibliography. This makes this book lighter and easier to carry without sacrificing depth. An accompanying "Teaching DVD," which is available to adopting professors, shows different styles of negotiation and mediation, techniques ranging from empathic listening to evaluation, as well as other examples coordinated with student role-plays.

A note about form: In order to focus discussion and conserve space, we have substantially edited the readings and have deleted most footnotes, references, and case citations. Excerpts from other publications are referenced only with the beginning page of the original source. 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 grateful to the many students and lawyers we have had the pleasure of teaching and from whom we have learned much about what they want in a dispute resolution text. We are also thankful to the professors who have suggested corrections and improvements for this new edition.

January 2010

J.F.
D.G.
T.S.
L.K.

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