



# DISPUTE RESOLUTION

---

## Negotiation, Mediation, and Other Processes

Second Edition

STEPHEN B. GOLDBERG

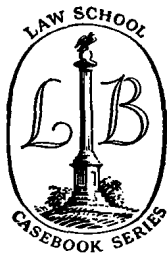
Professor of Law  
Northwestern University

FRANK E.A. SANDER

Bussey Professor of Law  
Harvard University

NANCY H. ROGERS

Associate Professor of Law  
Ohio State University



Little, Brown and Company  
Boston      Toronto      London

Copyright © 1992 by Stephen B. Goldberg, Frank E. A. Sander, and  
Nancy H. Rogers

All rights reserved. No part of this book may be reproduced in any form or by any  
electronic or mechanical means including information storage and retrieval systems  
without permission in writing from the publisher, except by a reviewer who may  
quote brief passages in a review.

Library of Congress Catalog No. 92-70816  
ISBN 0-316-31938-4  
*Fifth Printing*

EB  
Published simultaneously in Canada  
by Little, Brown & Company (Canada) Limited  
Printed in the United States of America

To Jeanne Brett, Valerie, Gillian, Amanda, and  
Benjamin Goldberg,  
Emily, Alison, Tom, and Ernie Sander, and  
Doug, Lynne, Jill, and Kimberly Rogers,

with undisputed gratitude

## Preface

---

It has been seven years since the first edition of this book appeared. Much has happened in the interim. Our goal here has been to reflect these new developments. We have added new chapters on ADR and the courts, the resolution of public policy disputes, and dispute systems design. The concluding chapter, focusing on Institutionalization of ADR, reflects our judgment that this is one of the critical themes of the 1990s.

We have also substantially expanded the number of simulations because of our conviction that these represent excellent ways for students to gain an understanding of the various processes. A number of the simulations are keyed to available videotapes, so that students can first do the simulations themselves and then see how they are handled by experienced dispute resolvers—a sequence that we have found particularly instructive.

While stressing these innovations, we have retained what we regard as the most successful features of the original volume: a broad overview of the field, followed by critical examination of the primary dispute resolution processes—negotiation, mediation, and arbitration—as well as some of their hybrid variants. This is followed by a description and analysis of several noteworthy applications, ranging from the familial to the global. The book concludes with a series of problems that test the student's ability to apply what has been learned about the various processes.

There are various ways in which this book can be employed in teaching ADR. It can be used in a basic course—first, by looking to the text and excerpts as a basis for a conceptual discussion of the legal and policy issues. A second approach would be to organize class discussion around the questions that follow each chapter. Quite obviously, these two approaches can be combined.

A considerably different approach looks to the book as background reading for simulations. Such simulations are used to acquaint the student with various dispute resolution processes by having the student watch or engage in the simulations as, for example, a negotiator, mediator, or arbitrator. This approach, too, can be combined with any of

the others. The Teacher's Manual contains our suggestions for various ways of presenting such a basic overview course.

Of course, the book can also be used for more specialized offerings, such as an advanced seminar in conflict resolution.

We begin each chapter with an introductory note designed to orient the student to the main themes of the text and excerpts that follow. The excerpts have been selected from what we view as the most interesting and important materials in each area of dispute resolution; they are supplemented by a considerably greater amount of original text than was present in the original edition.

In general, footnotes and other references have been omitted from the excerpts; footnotes that have not been omitted retain their original numbering. Our own footnotes are indicated by asterisks. Most chapters also contain a series of questions designed to raise some of the important issues suggested by the materials and conclude with a list of references. Included in these lists are the books and articles cited in the chapter, as well as materials that we recommend for additional reading. Items from which excerpts are drawn are not necessarily included in these lists. A cumulative compendium of references is found in the back of the book.

We have followed standard conventions in the use of ellipses. In excerpts that use an outline format, we have not included ellipses where an interruption of the numbered or lettered sequence of material indicates an omission.

This book is primarily intended for law students and lawyers. We hope that others will also find it useful, but it seems important to stress that this is not intended as a book on the philosophical or sociological aspects of conflict. Others have performed this task far better than we could.

We gratefully acknowledge the sources of funding for the work that led to this book: National Institute For Dispute Resolution, Charles E. Culpeper Foundation grant to The Harvard Law School Dispute Resolution Program, Dispute Resolution Research Center at Kellogg Graduate School of Management, Northwestern University Law School, Ohio State University College of Law, Julius Rosenthal Fund, and William M. Trumbull Fund.

We also wish to record our appreciation to the many people who have provided valuable assistance, most particularly Albert Bell, Christian Buehring-Uhle, Sandy Caust-Ellenbogen, James Farris, Terri Foltz, Anne Funk, David Goldberger, Carole Hinchcliff, Debbie Hylton, Carol King, Carol Liebman, Eric Max, Craig McEwen, Jim Oliphant, Carol Peirano, Janet Rifkin, Leonard Riskin, Sharon Roney, Mary Rowe, Valerie Sanchez, Linda Singer, Barbara Snyder, Richard Speidel, Lawrence Susskind, Marilyn Uzuner, Detlev Vagts, Pat Williams, and Charlie Wilson. Our work was also made easier by the prior edition of this book to which

Eric Green made a valuable contribution. Last but not least, we want to acknowledge our gratitude to the countless students who have helped to sharpen our thinking about ADR.

S.B.G.  
F.E.A.S.  
N.H.R.

May 1992

# Acknowledgments

---

The authors gratefully acknowledge the permissions granted to reproduce the following materials.

ADLER, Nancy J. (1991) *International Dimensions of Organizational Behavior*, 2d ed. (Boston: PWS-KENT Publishing Company). Reprinted by permission.

AMERICAN BAR ASSOCIATION (1983) *Model Rules of Professional Conduct*. Copyright © 1983 by the American Bar Association. All rights reserved. Permission to reprint granted by the American Bar Association.

AMERICAN BAR ASSOCIATION (1984) *Standards of Practice for Lawyer Mediators in Family Disputes*. Copyright © 1984. Reprinted by permission of the American Bar Association.

CARTER, Jimmy (1982) *Keeping Faith: Memoirs of a President* by Jimmy Carter. Copyright © 1982 by Jimmy Carter. Used by permission of Bantam Books, a division of Bantam Doubleday Dell Publishing Group, Inc.

CHERNICK, Richard (1989) "Private Judging," 3 *BNA Alternative Dispute Resolution Report* 397. Reprinted with permission from a 1991 special report, *Alternative Dispute Resolution: Practice and Perspectives* (BSP-149) published by the Bureau of National Affairs, Inc.

CROUCH, Richard E. (1982) "The Dark Side of Mediation: Still Unexplored," *Alternative Means of Family Dispute Resolution* 339. This article first appeared in *Family Advocate*, a publication of the ABA Family Law Section. Reprinted by permission.

DAUER, Edward A. (1989) "Impediments to ADR." Reprinted by permission of *The Colorado Lawyer* from vol. 18, no. 5, copyright © *The Colorado Lawyer* 839, the Colorado Bar Association 1989. All rights reserved.

EISELE, G. Thomas (1991) *Mandatory v. Non-Mandatory Court-Annexed ADR*. Reprinted by permission.

FISHER, Roger, and William URY (1981, 1991) *Getting to Yes*. Copyright © 1981, 1991 by Roger Fisher and William Ury. Reprinted by permission of Houghton Mifflin Company. All rights reserved.

FISS, Owen (1984) "Against Settlement," 93 *Yale Law Journal* 1075. Reprinted by permission of the Yale Law Journal Company and Fred B. Rothman & Company.



FOLBERG, Jay (1983) "Divorce Mediation—Promises and Problems," paper prepared for Midwinter Meeting of ABA Section of Family Law, St. Thomas. Reprinted by permission.

GOLDBERG, Stephen B., Jeanne M. BRETT, and William L. URY (1991) "Designing an Effective Dispute Resolution System." Adapted from S.B. Goldberg, J.M. Brett, W.L. Ury, "Designing an Effective Dispute Resolution System" in *Donovan Leisure Newton & Irvine Practice Book*, J. Wilkinson, editor. Copyright © 1991 by John Wiley & Sons, Inc. Used with permission.

GOLDBERG, Stephen B., Eric D. GREEN, and Frank E.A. SANDER (1989) "Litigation, Arbitration or Mediation: A Dialogue," *A.B.A.J.* Reprinted with permission from the June 1989 issue of the *ABA Journal*, *The Lawyer's Magazine*, published by the American Bar Association.

HARTER, Philip (1982) "Negotiating Regulations: A Cure for Malaise," 71 *Geo. L.J.* 1. Reprinted with permission of the publisher. Copyright © 1982 The Georgetown Law Journal Association.

HAYNES, John (1981) *Divorce Mediation: A Practical Guide for Therapists and Counselors*. Reprinted by permission of John Haynes, President, Haynes Mediation Associates, New York.

HONEYMAN, Christopher (1988) "Five Elements of Mediation," 4 *Neg. J.* 149. Reprinted by permission.

HOUCK, Stephen D. (1988) "Complex Commercial Arbitration: Designing a Process to Suit the Case," 43 *Arb. J.* 3. Reprinted from *The Arbitration Journal*, a quarterly magazine published by the American Arbitration Association.

KATZ, Lucy V. (1988) "Enforcing an ADR Clause—Are Good Intentions All You Have?" 26 *Am. Bus. L.J.* 575. Reprinted by permission.

KELLY, Joan B. (1989) "Dispute Systems Design: A Case Study," 4 *Neg. J.* 373. Reprinted by permission.

KNEBEL, Fletcher, and Gerald S. CLAY (1987) *Before You Sue*. Copyright © 1987 by Fletcher Knebel and Gerald S. Clay. By permission of William Morrow & Company, Inc.

LAX, David A., and James K. SEBENIUS (1988) *The Manager as Negotiator*. Copyright © 1988 by David A. Lax and James K. Sebenius. Reprinted by permission of The Free Press, a Division of Macmillan, Inc.

LERMAN, Lisa (1984) "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women," 7 *Harvard Women's Law Journal* 57. Reprinted by permission.

McEWEN, Craig (1992) *Note on Mediation Research*. Printed by permission.

McEWEN, Craig, and Richard MAIMAN (1981) "Small Claims Mediation in Maine: An Empirical Assessment," 33 *Maine Law Review* 237. Reprinted by permission of the Maine Law Review.

McGOVERN, Francis (1986) "Toward a Functional Approach for

Managing Complex Litigation," 53 *University of Chicago Law Review* 440. Reprinted by permission.

MELTSNER, Michael, and Philip G. SCHRAG (1973), "Negotiating Tactics for Legal Services Lawyers." Reprinted with permission from 7 *Clearinghouse Rev.* 259 (1973). Copyright © 1973, National Clearinghouse for Legal Services, Inc.

RAIFFA, Howard (1982) *The Art and Science of Negotiation*. Reprinted by permission of Harvard University Press. Copyright © 1982 by the President and Fellows of Harvard College.

RISKIN, Leonard (1991) "The Represented Client in a Settlement Conference: The Lessons of *G. Heileman Brewing Co. v. Joseph Oat Corp.*," 69 *Wash. U.L.Q.* 1059. Reprinted by permission.

ROGERS, Nancy, and Richard SALEM (1987), *A Student's Guide to Mediation and the Law*. Copyright © by Matthew Bender and Company, Inc. Reprinted by permission.

RUBIN, Jeffrey, and Frank SANDER (1981), "Culture, Negotiation, and the Eye of the Beholder," 7 *Neg. J.* 249. Reprinted by permission.

RUBIN, Jeffrey, and Frank SANDER (1988) "When Should We Use Agents," 4 *Neg. J.* 395. Reprinted by permission.

SANDER, Frank, and Michael PRIGOFF (1980) "Professional Responsibility: Should There Be a Duty to Advise of ADR Options?" 76 *A.B.A.J.* 50 (Nov.). Reprinted by permission.

SANDER, Frank, and Jeffrey RUBIN (1988) "The Janus Quality of Negotiation," 4 *Neg. J.* 109. Reprinted by permission.

SIEMER, Deanne C. (1991) "Perspectives of Advocates and Clients on Court-Sponsored ADR," in *Emerging ADR Issues in State and Federal Courts*. Copyright © 1991. Reprinted by permission of the American Bar Association.

SINGER, Linda (1991) *Settling Disputes*. Reprinted by permission.

SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION (1989) *Report of the SPIDR Commission on Qualifications*. This publication was funded by a grant from the National Institute for Dispute Resolution. Reprinted by permission.

SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION (1990) *Mandated Participation and Settlement Coercion: Dispute Resolution as it Relates to the Courts*. This publication was funded by a grant from the National Institute for Dispute Resolution. Reprinted by permission.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (1990) *ADR Case Classification System*. Reprinted by permission of the Superior Court of the District of Columbia.

SUSSKIND, Lawrence, and Jeffrey CRUIKSHANK (1987) *Breaking the Impasse*. Copyright © 1987 by Basic Books, Inc. Reprinted by permission of Basic Books, a division of HarperCollins Publishers.

SUSSKIND, Lawrence, and Gerald McMAHON (1985) "The Theory and Practice of Negotiated Rulemaking." Copyright © 1985 by the Yale

*Journal on Regulation*. Box 401A Yale Station, New Haven, Ct 06520. Reprinted from Volume 3:133 by permission. All rights reserved.

URY, William (1991) *Getting Past No*. Copyright © 1991 by William Ury. Used by permission of Bantam Books, a division of Bantam Doubleday Dell Publishing Group, Inc.

WHITE, James (1980) "Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation," *American Bar Foundation Research Journal* 926. Reprinted with permission from 1980 American Bar Foundation Research Journal.

WHITE, James (1984) "The Pros and Cons of 'Getting to Yes,'" 34 *Journal of Legal Education* 115. Copyright © 1984 by AALS. Reprinted by permission of the Journal of Legal Education.

WILLIAMS, Gerald (1983) *Legal Negotiation and Settlement*. Reprinted with permission of the West Publishing Co.

The authors acknowledge further the permissions granted to reproduce the following exercises.

Alpha-Beta Robotic Negotiation. Adapted with permission from a simulation created by Thomas N. Gladwin, Director of the International Business Negotiation Program, Leonard N. Stern School of Business, New York University.

Bryan v. Oakdale. Reprinted by permission of the Harvard Program on Negotiation.

The Daily Bugle. Reprinted by permission.

The Halfway House. Adapted with permission of the authors.

Little v. Jenks. Reprinted by permission of the Harvard Program on Negotiation.

Medical Malpractice Claim. Reprinted by permission.

The Neighborhood Spat. Adapted with permission from ROGERS, Nancy, and Richard SALEM (1987) *Teacher's Guide to A Student's Guide to Mediation and the Law*.

Populator Pricing. Copyright © 1986 by the President and Fellows of Harvard College. All rights reserved. Reprinted with permission.

Rapid Printing v. Scott Computers. Reprinted by permission of the authors.

The Red Devil Dog Restaurant Lease. Reprinted by permission.

Texoil. Reprinted by permission.

World Oil Co. v. Northeast Shipbuilding. Adapted with permission of National Institute for Trial Advocacy.

# Summary of Contents

---

<i>Table of Contents</i>	<i>ix</i>
<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xxi</i>
PART I OVERVIEW	1
1. Disputing Procedures	3
PART II PROCESSES	15
2. Negotiation	17
3. Mediation	103
4. Arbitration	199
5. Hybrid Processes	223
PART III DISPUTE RESOLUTION IN THE JUSTICE SYSTEM	241
6. Dispute Resolution in the Justice System	243
PART IV SELECTED APPLICATIONS	297
7. Family Disputes	299
8. Public Disputes	335
9. International Disputes	359
PART V PLANNING	403
10. Designing Systems	405
11. Institutionalization	421
12. Dispute Resolution Exercises	453
Appendix A. ABA Standards for Lawyer Mediators in Family Disputes	469
Appendix B. Colorado Council of Mediation Organizations, Code of Professional Conduct	475
	<b>vii</b>

Appendix C. Dispute Resolution Clauses	483
<i>Table of Cases</i>	487
<i>Collected References</i>	489
<i>Index</i>	499

# Table of Contents

---

<i>Preface</i>	<i>xvii</i>
<i>Acknowledgments</i>	<i>xxi</i>
<b>PART I OVERVIEW</b>	<b>1</b>
Chapter 1 Introduction	3
A. The Processes	3
B. Sources and Goals of the Alternative Dispute Resolution Movement	6
C. Applications	10
D. Concerns	11
References	12
<b>PART II PROCESSES</b>	<b>15</b>
Chapter 2 Negotiation	17
M. Meltsner and P. Schrag, Negotiating Tactics for Legal Services Lawyers	18
H. Raiffa, The Art and Science of Negotiation	23
Questions	35
Note: Principled Negotiation	36
W. Ury, Getting Past No	38
J. White, The Pros and Cons of "Getting to Yes"	45
R. Fisher, W. Ury, and B. Patton, Getting to Yes	48
D. Lax and J. Sebenius, The Manager as Negotiator	49
Questions	60
D. Lax and J. Sebenius, The Manager as Negotiator	62
Questions	65
	<b>ix</b>

Note: The Janus Quality of Negotiation— Dealmaking and Dispute Settlement	66
J. Rubin and F. Sander, When Should We Use Agents? Direct vs. Representative Negotiation	69
Questions	73
J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation	74
ABA, Model Rules of Professional Conduct	82
Questions	83
Exercises	85
References	101
 Chapter 3   Mediation	 103
A.   The Practice of Mediation	104
N. Rogers and R. Salem, A Student's Guide to Mediation and the Law	104
R. Fisher and W. Ury, Getting to Yes	110
C. Honeyman, Five Elements of Mediation	113
Note	116
F. Knebel and G. Clay, Before You Sue	116
Note: The Role of Apology in Dispute Resolution	137
Note: Dealing with Differences	139
Questions	141
B.   Public Encouragement of Mediation	142
1.   Varying Viewpoints	143
a.   The Parties' Satisfaction with the Process and Result	143
b.   The Role of the Law and the Role of the Community	144
c.   Equal Justice	145
d.   The Effect on the Courts	147
2.   Social Science Assessments of Mediation	148
C. McEwen and R. Maiman, Small Claims Mediation in Maine: An Empirical Assessment	148
C. McEwen, Note on Mediation Research	155
Questions	157
C.   Regulating Mediation	159
1.   The Standards	160
a.   Balanced Negotiation Process	160
b.   Equivalent or "Fair" Outcomes	161

c.	Impact of the Outcome on the Courts	161
d.	Impact of the Outcome on Costs	162
e.	A Word on Comparative Standards	162
f.	In Sum	163
	Questions	163
2.	Enforcement Mechanisms	164
a.	Mediator Qualifications	164
	Society of Professionals in Dispute	
	Resolution, Report of the SPIDR	
	Commission on Qualifications	164
	Questions	171
b.	Holding the Mediator Accountable	171
	Note: The Life of the Mediator—To Be or	
	Not to Be (Accountable)	171
	Note: Mediator Accountability	176
	Questions	177
c.	Required Mediation Procedures	178
	Questions	179
D.	Confidentiality	179
1.	Fostering Mediation	181
	<i>NLRB v. Joseph Macaluso, Inc.</i>	182
	Questions	184
	Note: A Common Law Privilege for Private	
	Mediators— <i>Mack Truck v. United Auto</i>	
	<i>Workers</i>	185
	Note: The “Holder” of the Privilege	187
	Questions	187
2.	Considering the Need for Evidence or Disclosure	188
	<i>State v. Castellano</i>	188
	Questions	189
	Exercises	190
	References	195
Chapter 4	Arbitration	199
A.	The Process	199
	Arbitration or Litigation: A Dialogue	203
	Questions	206
	S. Houck, Complex Commercial Arbitration:	
	Designing a Process to Suit the Case	207
	Questions	210
B.	Arbitration and the Courts	210
	Note: Post- <i>Gilmer</i> Issues—Fairness of the	
	Bargaining, Procedure, and Outcome	215



Questions	218
References	221
 Chapter 5 Hybrid Processes	 223
A. Variants of Arbitration	223
1. Arbitration of Disputes About Contract Terms and Final Offer Arbitration	223
2. Arbitration Under a “High-Low” Contract	225
3. Med-Arb	226
Questions	228
B. Minitrial	230
Exercise	232
C. Summary Jury Trial	235
Questions	236
D. Ombudsman	236
L. Singer, Settling Disputes	237
References	239
 PART III DISPUTE RESOLUTION IN THE JUSTICE SYSTEM	 241
Chapter 6 Dispute Resolution in the Justice System	243
O. Fiss, Against Settlement	244
A. Alternatives to Court Adjudication	250
1. Court-Annexed Arbitration	250
2. Early Neutral Evaluation	250
3. Summary Jury Trial	251
4. Mediation	251
5. Special Master Mediator	251
F. McGovern, Toward a Functional Approach for Managing Complex Litigation	252
Questions	260
Note: Empirical Data	261
B. Mandatory Participation and Pressure to Settle	262
SPIDR, Mandated Participation and Settlement Coercion: Dispute Resolution as It Relates to the Courts	262
T. Eisele, Mandatory v. Nonmandatory Court-Annexed ADR	268