

*MENKEL-MEADOW
SCHNEIDER
LOVE*

NEGOTIATION
**Processes for
Problem Solving**

ASPEN
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On January 31, 2005, Aspen Publishers lost a great author, colleague, and friend with the death of E. Allan Farnsworth, the Alfred McCormack Professor of Law at Columbia Law School and author of the seminal student treatise, *Contracts*, Fourth Edition, by Aspen Publishers.

NEGOTIATION

Processes for Problem Solving

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We dedicate this book to those mentors and colleagues from whom and with whom we have learned about negotiation and problem solving, especially Roger Fisher, Howard Raiffa, Larry Susskind, Mike Wheeler, Robert Mnookin, Deborah Kolb, Bruce Patton, Jim Sebenius, Josh Stulberg, Frank Scardilli, and Jim Coben.

We also dedicate this book to the community of negotiation scholars and practitioners who have made our choices in teaching, practice, and scholarship so immensely rewarding.

May we all continue to learn together, with each other, and with the next generation.

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economics and psychology). Then, in the 1960s and 1970s, another effort to transform legal education, the Clinical Education movement, spawned intensive study and teaching of the skills employed by lawyers to do their work. Negotiation was one of several important skills, including interviewing, counseling, trial practice, drafting, and decision making, taught in separate courses, with simulations, case studies, and exercises, transforming the materials through which law is studied. No longer is the appellate case the only text in the classroom.

Much negotiation theory was derived from the intellectually rich era of game theoretic and strategic study in World War II and Cold War simulations of “Prisoner’s Dilemma” and other games, intended to map how parties act under conditions of uncertainty and scarce resources. Much of the lawyer’s conventional “map” of negotiation (and the businessperson’s selling or buying) is based on these early models of competitive bargaining and assumptions of scarce resources.

As economic and political conditions changed during the 1970s and 1980s, offering a potentially more optimistic view of human nature and the ability to create, as well as divide, human resources, a movement of intellectual convergence around a new way to negotiate was born with the publication of several new approaches to negotiation, including the now world-famous *Getting to YES* (Roger Fisher, William Ury & Bruce Patton 2d ed. 1991, first published 1981), Howard Raiffa’s *The Art and Science of Negotiation* (1982), David Lax & James Sebenius’s *The Manager as Negotiator* (1986), and, applied to legal negotiations specifically, Carrie Menkel-Meadow’s *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 485 (1984). These works all expanded on ideas of using more integrative and collaborative processes (using appeals to reason and objective standards, as well as to underlying needs, wants, and desires) to achieve better, that is more Pareto-optimal, outcomes for the parties—giving the parties as much of what they both need without unnecessary loss or harm to either. This pragmatic, principled, and utilitarian model of negotiation then was taught to thousands of law, business, policy, and graduate students as a “corrective” to the overly adversarial and possibly wasteful, but more common, approaches of competitive and distributional bargaining. Courses in negotiation are now required in many business and public policy schools, and they exist in virtually every law school. Modern professionals from many disciplines are learning about the processes that are necessary to design solutions to human problems when consent, not command, is required to achieve good results.

The last few decades have seen an outpouring of work (both scholarly and practical) studying under what conditions, and with what people and issues, different models of negotiation might be appropriately employed. Our second author was an early student of these processes in both international and domestic contexts, studying at one of the premier organizations, the Program on Negotiation at Harvard Law School, with the field’s modern founders. Our third author harnessed the early teachings of negotiation theory to become one of the founders of the modern mediation movement in American, now also European, law schools. All three of the authors of this book have studied and practiced negotiation in a wide variety of contexts, both domestic and international, and this book reflects our learning at all of these levels: theoretical, practical, domestic, international, dyadic, multiparty, legal, and personal.

We have dedicated this book to some of the field's founders, with whom we have worked and with whom we have learned. But, rather than only looking backward, we also acknowledge the flowering of a new generation of negotiation scholars who have uncovered new patterns in negotiation behavior, both distortions in the processes that prevent good agreement and incentives that encourage good behaviors to produce better outcomes for parties. You will find their work on these pages.

The use of negotiation in law remains controversial (though it is the mainstay of legal practice). When should parties be permitted to “privatize” their actions and agreements? When should disputes be resolved in the public sphere, creating precedents for the rest of us? When is negotiation more efficient? Whom should negotiation serve: the parties inside the process, or those affected by it? Does negotiation result in unprincipled, transaction cost-reducing compromise, or can it provide solutions more precisely tailored to the needs of the parties and justice for those whose problem it is? When should we negotiate? When should we not negotiate? We explore these critical questions in this book too.

The authors of this book are firmly committed to the notion that negotiation is not only essential in human interaction but that it also promises to promote the best of human flourishing. If we are perceived to be in the “as long as they are talking, they are not killing” school of negotiation, it is because we do hope and believe that with the right intentions and good instruction, we can all learn to be better problem solvers, decision makers, and negotiators by studying this process, practicing it, and looking for new ways to improve human communication.

We begin this book by reviewing basic theoretical concepts and models of conflict, dispute resolution, and negotiation. Next, we focus on the classic models of negotiation: preparing for and conducting integrative and distributive bargaining. Then we turn to the important interpersonal skills required to negotiate, including working with clients and counterparts to create trust and rapport, learn information, and craft good solutions. Next we confront the barriers to reaching good agreements, that is, the variety of social, cognitive, cultural, and material impediments to negotiation. We explore some of the difficult and significant ethical dimensions of negotiating with and on behalf of others and review how various bodies of law constrain negotiation in legal matters. Finally, we provide some examples of modern and sophisticated applications of negotiation processes in multiparty and international settings. And we conclude the book with an introduction to what we treat in more detail in our companion volumes (Menkel-Meadow, Love, Schneider & Sternlight, *Dispute Resolution: Beyond the Adversarial Model* (Aspen 2005), and Menkel-Meadow, Love & Schneider, *Mediation: Practice, Policy, and Ethics* (Aspen 2006)) — facilitated negotiation or mediation. The accompanying *Teacher's Manual* to this book provides one of the largest available collections of negotiation simulations, role-plays, exercises, and case studies. We firmly believe that this is a field of study that must be practiced to be learned and that theory must be developed from its usefulness.

Footnotes by the authors of this book, in both the excerpts and our text, are marked using symbols. The order of the footnote symbols, if more than one symbol appears on a page, is * † ‡. The original footnote numbering in the excerpts has been retained.

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And mostly, we thank our students whom we hope will use these materials to create a better world—one with peace, sensitive and rigorous problem solving, and justice.

Let us know what you think.

*Carrie Menkel-Meadow
Andrea Kupfer Schneider
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