Preface to the Fourth Edition

Well, here we are twenty years after the first edition of this book, with a few personnel changes—Kristen Blankley joins Andrea Kupfer Schneider, Lela Love, Michael Moffitt, and Carrie Menkel-Meadow—to update our text to reflect the fact that twenty years on, conflict and disputes are still with us (as they are likely to be forever!). Despite the fact that not all disputes and conflicts have been "resolved," "managed," or "handled" (all different forms of dealing with conflicts and disputes), we do now have even more processes and methods to learn about—hybrid adaptations of the basic processes, online dispute resolution, artificial intelligence, dispute system design, and international and organizational processes that draw from different legal and cultural traditions. So, we still have plenty to teach and learn in our no longer "new" field.

We remain committed to the notion of "process pluralism," that no one method of dispute resolution will serve for all kinds of disputes and conflicts. Disputes—social, legal, familial, organizational, international, economic—all have contexts, different background rules or customs, varied parties, and varied sources of authority or legitimacy. This revised edition updates some of the conventional and older processes—negotiation, mediation, and arbitration, with new caselaw, new social science research, and new narratives of both successful and problematic efforts at conflict resolution, mostly, but not exclusively within (or adjacent to) the American legal system (with some treatment of international forms of dispute resolution). In addition, we look at the now expanding uses of online dispute resolution, artificial intelligence, and dispute system design (with obvious applications to the [we hope!] post-pandemic learning of dispute resolution by Zoom). We continue to question more conventional conceptions of disputes and conflicts as being about two contesting parties (with lawyers) using adversarial methods of argument and decision-making as an exclusive or most common form of dispute resolution, instead of the often more realistic and complex forms of multi-party and multiple issue forms of dispute resolution. Instead, we hope that students will learn to counsel clients (and themselves) to choose dispute resolution methods and

processes that are most appropriate for the parties and the subject matter of any particular dispute.

In light of some recent conversations in our field, we note that this book was never called "Alternative" Dispute Resolution—but always Dispute Resolution, highlighting that even 20 years ago we didn't think negotiation, mediation and arbitration were just "alternatives" to one default form of legal problem solving—litigation. Whether the "A" stands for "alternative," "appropriate," "accessible," or "aspirational" dispute resolution, the processes of negotiation, mediation, and arbitration have long become far more "common" or normative for legal problem solving than litigation. This book then aims to teach students about the many processes, including transactional negotiation and negotiated rule-making, and large group facilitation for decision-making (e.g. zoning, legislation, and community dispute resolution), so that they may counsel their clients to make good decisions about how to deal with legal problems, create new entities, and structure constructive human decision making in a variety of contexts, as lawyers, leaders, facilitators, mediators, and yes, even judges!

We have once again streamlined the book (put it on a "diet") to make each chapter potentially teachable in a single week of class sessions for a full semester course. Our accompanying Teacher's Manual provides many simulations and role-plays (both short and extended) so that the book continues to focus on both theory and practice of each particular process. We continue to provide Problem Boxes in each chapter which can serve as classroom discussion prompts, homework assignments, policy discussions and yes, even exam questions or extended research topics for those using papers or projects in their teaching. We are all committed to the need for active participatory learning in this field and we also provide (in the Teacher's Manual) references to and suggestions for video, films, novels and literature (and dare we say "games" [e.g. Risk]) that provide examples of various forms of dispute resolution. Alas, Hollywood often distorts what really happens and students come to us with often preconceived (and often incorrect) conceptions of what each process is like. Sadly, even many practicing lawyers still don't know the difference between arbitration and mediation, so we suggest some "field" projects and activities so students can see how these processes really work in the real world. All of the authors have practiced in these fields, and we think education about Dispute Resolution works best with teachers who focus on both the big jurisprudential issues (e.g. is ADR privatizing justice?) and the practice issues (to caucus or not to caucus that is the question!) with attention to how practices affect the people using them and then the larger system in which they are embedded. What are the areas that need reform and who can reform dispute resolution—formal legislative processes or private creativity (e.g. the big case Mini-Trial of yore)?

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Carrie thanks Andrea for taking over "management" of this edition—believe me, you are in better hands now. She especially thanks her research assistants, Alexandra Cadena and Celine Gruaz, and UCI librarians extraordinaire, Dianna Sahhar and Jeff Latta. Her assistant, Maria Gonzalez De Toro has been a problem solver, life saver, and friend. She thanks her students in courses including

"A"DR, Negotiation, International Dispute Resolution, Mediation, Complex Multi-Party Dispute Resolution, International Arbitration, and International Legal Analysis for always teaching her something new about her own field and the complexities of changing generational and legal cultures. The pandemic slowed down international teaching and lecturing, but not completely, and she thanks the Oxford Centre for Socio-legal Studies where much of these revisions were done in 2023, and Naomi Creutzfeldt and Horst Eidenmüller for inviting her to teach to an array of international and gifted students at Oxford and to online Zoom teaching in Belgium, Argentina, Chile, the UK, Israel, and Italy (where she prefers teaching in person!!). Carrie has mentored over 20 former students now teaching some of these materials in many countries and she especially thanks Kondi Kleinman, Peter Reilly, Clark Freshman, Michalyn Steele, Ana Carolina Viella, Orna Rabinovitz-Einy, Amy Cohen, Ana Silva, Hugo Rojas, Renzo Parodi, Alain Verbeke, Leticia Coppo, Rutger Metsch, Remy Gerbay, and others who continue to inspire her with teaching and practice ideas. Her service as Associate Editor of Harvard's Program on Negotiation, *Negotiation Journal* has kept her up to date on new research and teaching topics, and she thanks Joel Cutcher-Gershenfeld, Dan Druckman, Melissa Manwaring, and Silvia Glick for superb editorial meetings and symposia which continue to stretch the reach of the field. She sadly laments the loss of interactions of many former friends and leaders in the field who have departed this earth or their day jobs (retirement) including Frank Sander, Howard Raiffa, Roger Fisher, Margaret Shaw, Wallace Warfield, Michael Wheeler, Debbie Kolb, Robert Mnookin but a few of the field's leaders continue to hover and share their insights—Jim Sebenius, Larry Susskind, Howard Gadlin, Chris Honeyman, and the Senior Mediators Group. And most of all thanks to her very best student, Robert Meadow, problem solving negotiator for over fifty years.

Andrea thanks her co-authors for agreeing to "get the band back together" (with the excellent addition of Kristen), and arrive at a Fourth Edition to this textbook in record time. We are excited to bring this to you with all that has changed in the last few years. She thanks her research assistants Madison Gagne, Dighan Kelly, Matthew Kee and Alexa Miller for their excellent work. And Andrea is grateful to her new home, Cardozo Law School, for all of the support that the school has provided toward this book and, more importantly, in supporting the growth and development of the field of dispute resolution. And to the now thousands of students with whom she has explored these materials, she is eternally grateful for the best job in the world and the ability to continue to learn from you about dispute resolution—the good, the bad, and the ugly. She believes that we can find our best selves in how we approach conflict—she remains optimistic at the prospect of continuing to teach and build these skills.

Lela thanks Carrie for spearheading this project in the first place and Andrea for leading the charge on this 4th edition of book and for leading Cardozo's beloved dispute resolution program. She also thanks Robyn Weinstein for taking over Cardozo's Mediation Clinic and the care and keeping of the circle of alumni and friends who surround us there. She thanks her excellent Research Assistant, Corbin Gregg, for his most thoughtful work editing the manuscript.

Michael thanks the original co-authors of this casebook for their gracious invitation to join the team years ago. He thanks the University of Oregon and its leadership for many forms of conspicuous support for this project (for example funding through the Knight Chair in Law), and for the attitudinal support for this kind of work (a "good job!" now and then from a Dean or Provost or President goes an embarrassingly long way, and he is grateful to have received those). He also thanks the hundreds of practitioners and the thousands of disputants from and with whom he has worked over the years. Being invited (and being invited back!) to help disputants think through some of their hardest challenges has been a singular honor, and he hopes that students will learn not only the particulars of what seems to work, but also and perhaps more importantly, that one can (and perhaps must try?) to help when one can.

Kristen thanks her co-authors for the honor of being added to this Fourth edition of this text. She thanks them and all of the previous authors for their insight and excellent work on the First, Second, and Third editions. Her work on the Fourth edition was undoubtedly easier and smoother given the significant work put into the prior editions. She also thanks the University of Nebraska College of Law for supporting her dispute resolution work. She is extremely grateful for the opportunity to learn from her students and clients, and her experiences as a teacher and practitioner enrich her perspective on conflict and its resolution.

We thank The Froebe Group for fast, meticulous editing, especially Patrick Cline and Dena Kaufman for getting this to you all in almost record time for us busy law professors.

Mostly we thank each other for collaborations, including our former co-author, Jean Sternlight, now ongoing for decades as we continue to read, write, practice, think, and dream of a world that solves problems constructively and creatively. We certainly need it in these often-troubled times.

Please let us know what you think.

In peace,

Carrie Menkel-Meadow
Lela Love
Andrea Kupfer Schneider
Michael Moffitt
Kristen Blankley

November 2024

Preface to the Third Edition

The fact that we are writing a preface to a third edition of our Dispute Resolution text is evidence that the field is both now a consolidated field, and also that it is continually changing, requiring new materials, updates and reconceptualizations of some aspects of the field.

As we write this, both domestic and international dispute resolution issues remain at the foreground of legal, governmental, private and diplomatic activity. Negotiation (both in public diplomatic, legal, and private business settings) continues to be one of the most important human processes of conflict resolution and transaction planning (see *The Negotiator's Desk Reference,* Chris Honeyman and Andrea Kupfer Schneider, eds. 2017 DRI Press). Mediation is now often required by courts before litigation may proceed, and is chosen by many parties as the process with the most party control over both process and outcome. Increasingly international tribunals (including private commercial, trade and investment and public human rights) are also promoting mediation and more universities around the world are teaching mediation as an essential part of both a legal and a general education. The authors of this text now teach with these materials across the globe. Arbitration continues to be "required" as mandatory in a wide variety of contractual settings, including consumer and employment contracts, which makes the United States an outlier in the world. This text adds brand new chapters on arbitration, as our Supreme Court continues to favor arbitral processes over a wide variety of claims against it, and we add a new arbitration expert to our collaboration—thank you Michael Moffitt!

As the foundational processes covered in this book—negotiation, mediation and arbitration—continue to be combined and altered to produce new hybrid forms of dispute resolution, some hybrids have fallen off in use (e.g., summary jury trials and mini-trials) while new ones emerge (e.g., final offer mediation) and some hybrids (e.g., ombuds) are attracting more usage in private companies and government agencies. This text continues to reflect the new uses of various dispute processes in more settings and to ask questions about the "scaling up" of

dispute resolution processes in our larger legal and democratic systems. This new edition focuses on perhaps the newest and most challenging form of dispute resolution "online dispute resolution" or ODR, which offers the potential for more access to justice (now called "ATJ"), as well as introducing concerns about "digital inequality." If Dispute Resolution (or ADR) is to continue to be "appropriate dispute resolution," we must always be mindful of its promises to deliver justice, fairness and good quality outcomes to those who participate in the processes.

The modern lawyer (and law student studying to be a modern lawyer) needs to understand and practice the many different ways of resolving clients' legal problems, using an ability to diagnose types of issues and problems and assessing the suitability of different processes for different kinds of legal problems and issues. The theme of "process pluralism" continues in this new version of the text, and we continue to focus on lawyers learning to counsel clients about appropriate process choices, from a perspective of knowing what each process offers, in terms of procedures used, party participation, choice, self-empowerment, creative solutions and achieving desired outcomes.

Assessment of what processes are appropriate for particular disputants, as well as for larger system choices, continue to be issues of both policy and ethics. As with our prior editions, each process is presented with a focus on skills, as well as the policy and ethical issues implicated in its use.

Any dispute resolution course works best with active participation by students in role-plays and simulations. These are available, both in the Teacher's Manuals to the texts we have written (*Dispute Resolution, Negotiation and Mediation)* and available online through WoltersKluwer for those who adopt this text. Each chapter contains "problem boxes" which ask students to actively engage in the materials. These problem boxes can be used for class discussion, as well as written assignments. Dispute resolution must be "practiced" to be learned and understood.

As in prior editions, we have tried to present a variety of materials, including general jurisprudential readings, skills prescriptions and exercises, cases, empirical studies, policy questions, and professional responsibility rules and questions to think about and discuss. We have heard the pleas of users (both students and professors) and have once again, trimmed our book, to make chapters shorter and more adapted to one chapter per class and or one chapter per week of a 14-week semester. We welcome your input and are all available to discuss pedagogic choices. Our revisions of the paperback "splits" for Negotiation and Mediation will follow shortly.

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Carrie, Lela and Andrea thank Michael Moffitt for joining us on this edition as he concludes his service as Dean of the University of Oregon Law School and Jean Sternlight, our esteemed colleague, leaves us to pursue her interests in arbitration in other venues. Thanks to both of them for continuing to collaborate with us on all the issues in the field. We have all shared ideas and inputs on these revised materials—adding new materials, particularly the most recent case law in arbitration, new materials in negotiation and mediation and hybrids, and removing material that is now dated, as the uses of various forms of dispute resolution

become more institutionalized. We still hope for more innovation and the development of new processes, as well as evaluative work on what is or is not working now. We welcome your input.

All of us remain grateful for the institutional support we receive from our institutions: Carrie thanks the University of California Irvine Law School (and the political science department), and Georgetown University Law Center for allowing her to teach a great variety of courses on the themes of this text (including Multi-Party and Advanced Dispute Resolution, Deliberative Democracy, as well as the basics, Negotiation, Mediation and ADR). She thanks Adelina Tomova for administrative assistance and generally helpful problem solving; and Caleb Nissley and Sarah Salvini for research assistance; Hagop Nazarian, Shunya Wade, Kevin Homrighausen and Tony Boswell for continued enthusiasm in studying dispute resolution and "youthifying" an old hand. In addition, she thanks students at the University of Torino, University of Hong Kong, the Center for Transnational Legal Studies (London), Queen Mary Law School, Haifa University, Leuven University (Belgium), and the University of Melbourne, as well as many other international venues where she has been able to use these materials and explore cultural variations in the uses of human dispute resolution systems. Lela Love thanks the Kukin Program for Conflict Resolution and the Benjamin Cardozo Law School for supporting her scholarship. Her wonderful colleagues at Cardozo have been so helpful—Donna Erez-Navot, the Assistant Director of the Kukin Program and Nicole Duke, the Program's RA. Also, Simeon Baum, Bob Collins, Brian Farkas, Tracey Frisch, Peter Halprin, Charlie Moxley, Glen Parker, Leslie Salzman, Robyn Weinstein, David Weisenfeld, Dan Weitz, and David White lend ongoing ideas and support—as well as Hal Abramson, Josh Stulberg, and Michael Tsur who come regularly to Cardozo and provide inspiration. Andrea Schneider (and the rest of us) continue to marvel at the ongoing contributions of Carrie Kratochvil who works to make all of this work come together. She is very appreciative of Marquette University Law School for its support of the Dispute Resolution Program and this book. She also thanks Ilena Telford, April Kutz, and Jad Itani for their research assistance on this edition. Michael Moffitt thanks the Appropriate Dispute Resolution Center at the University of Oregon School of Law, the Conflict and Dispute Resolution Master's Program at the University of Oregon, and Phil and Penny Knight for their continued support of his research and teaching. He thanks his research assistants from Oregon and Harvard: Haley Banks, Christopher Dotson, Deanna Goodrich, Christopher Groesbeck, Juhi Gupta, Ayoung Kim, Chantal Guzman-Schlager, Ben Pincus, Jordan Shapiro, Austin Smith and Elise Williard.

We continue to be grateful for our many mentors, noting with this edition the passing of Frank Sander, Howard Raiffa, Thomas Schelling, and Margaret Shaw, among the the founding fathers and mothers of our field. We continue to be inspired by them—to stretch their ideas into the 21st century, finding new uses of "varieties of dispute processing." Our students continue to inspire us and question us about when and how to use processes outside of courtrooms to resolve disputes. And, as we observe an increasingly polarized political world, both domestically and internationally, we are proud of our students, and yours, who are at the front

line of using these materials to look for new ways to work together productively, across perceived differences in values and ideals.

We continue to be thankful for and indebted to John Devins at Wolters Kluwer who believes in us and this project and helps achieve "justice" in law school publishing. We thank the Troy Froebe Group for editing and production—thanks to Lori Wood, Maxwell Donnewald and Geoffrey Lokke.

We also want to thank each other for the continuing collegial and enriching relationships we have as we negotiate the words on these pages and engage happily and productively with our wider and wonderful "ADR" community in legal education and now, the growing interest in our field around the world. Despite the difficulties in world and domestic politics, we still hope that reading and working with these materials will increase well being and peace and justice in the world.

Carrie Menkel-Meadow
Lela Porter Love
Andrea Kupfer Schneider
Michael Moffitt

August 2018

Preface to the Second Edition

Since the publication of our first edition in 2005 there has been continued growth and diversification in the "process pluralism" we have described in both the older edition and now this new edition. Increasing use is being made of negotiation, mediation, and arbitration, and creative system designers are combining these processes in new ways in varied contexts. At the international level, more and more transnational disputes, conflicts, and transactions are drawing on dispute resolution processes,[1] which we hope soon to cover in a separate book on Transnational Dispute Resolution.

Nevertheless, since our last edition, the United States has been participating in two new wars and litigation and its concomitant fees and costs have continued to climb, even while an economic recession has altered the legal landscape. With the recession we have seen more housing foreclosures, a rise in financial fraud and complex business litigation, and additional banking, housing, employment, and consumer disputes that have caused many people great personal and financial harm. There has also been a major realignment in the market for legal services.

Thus, we think the process pluralism of ADR has gained even more importance in our daily and professional lives, and remains at the core of what all law students (and lawyers) should learn as part of their basic legal education and experience. We see ADR in the courts, out of the courts in a myriad of forms, and increasingly, in areas of aggregated disputes and conflicts, within organizations and among peoples and nations, spawning the new separate field of dispute system design. We report here, in the last chapter, some of the newest empirical and other research, designed to test claims about ADR's usefulness in our (and other) societies.

As in the first edition, we continue to center dispute resolution processes in a context of problem solving for clients, including individuals, governmental agencies, groups, private entities, organizations, corporations and nations. In order to

1. Carrie Menkel-Meadow, Why and How to Study Transnational Law, 1 UC Irvine L. Rev. 97 (2010).

negotiate, arbitrate, or mediate, lawyers need to understand their clients' needs and interests and those of the other parties, so interviewing, counseling, listening, communicating, and understanding are important constituent activities of dispute resolution which are also covered in this book.

In this new edition we have listened to our readers and students and streamlined (and shortened!) the materials we present to you. Instead of *Notes and Questions*, we now provide you with clearly demarcated *Problems* found, (somewhat ironically, in a book that is about "thinking outside of the box") inside grey boxes, which are easy to read (if not always easy to solve). These problem boxes can be used as out-of-class thinking and homework assignments or serve as discussion points for classes, whether in large group or smaller task groups. The Teacher's Manual for both the earlier edition (and this one too) continue to supply the largest collection of shorter role-plays and longer simulations for any ADR text, demonstrating our belief that the subjects of negotiation, mediation, arbitration, and dispute resolution generally are learned best *in action* where *theories in use*[2] can be tested for their efficacy, appropriateness, and ability to solve clients' problems. Both this book and the companion shorter "splits"—*Mediation: Practice Policy and Ethics* and *Negotiation: Processes for Problem Solving* can be used in both classroom (survey or specialized) courses or clinical settings, both within and outside of the United States.

This new edition adds new materials, including a number of recently decided cases, primarily on arbitration issues, from the highest courts in the land, and the latest in commentary and scholarship on dispute resolution issues. We have also edited some of the classic materials from our first edition to a more manageable length.

This book is presented in several sections. We offer two introductory chapters on the history and jurisprudence of dispute processes, as well as the importance and underlying value of problem solving for clients and the skills necessary to problem-solve. Then in three separate chapters for each primary process of negotiation, mediation, and arbitration we cover concepts and models of that process, skills needed to be both representatives and third party neutrals in that process, and the ethical, legal, and policy issues that are implicated in the use of those processes. Next, we provide a section of the book examining more complex issues in dispute resolution: variations and combinations of dispute resolution processes in both private and public settings; uses of dispute resolution in multi-party and transactional settings; and insights from dispute system design and related planning for dispute resolution processes. Finally, we survey some of the issues in assessing the past uses and future possibilities of dispute resolution, both for clients and for the larger society.

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All of us remain grateful to our various institutions for support as teachers, scholars, and practitioners: Georgetown University Law Center, the Center for Transnational Legal Studies, and the University of California, Irvine Law School for Carrie Menkel-Meadow, Benjamin N. Cardozo Law School and its Kukin Program for Conflict Resolution at Yeshiva University for Lela Love, Marquette

2. Donald Schön, The Reflective Practitioner (1983).

University Law School and its Dispute Resolution Program for Andrea Kupfer Schneider and the University of Nevada, Las Vegas and its Saltman Center for Dispute Resolution for Jean Sternlight. We thank our deans, colleagues, and our many students who have worked with these materials and given us useful feedback.

We thank the many authors and publishers who have allowed us to reprint their materials (as formally acknowledged in the Acknowledgments). We are especially grateful to those who allowed us to use their materials without exorbitant permissions or royalty payments, in the interest of dissemination of learning and education. And we are grateful for the continued inspiration of both our intellectual mentors and seniors (a smaller group as we join the ranks of the "senior mentors" ourselves), and our enthusiastic students, many of whom want to make full-time careers in this field, which we all helped create and foster.

Individually and specifically we thank:

Carrie thanks Katherine M. Hayes (at Georgetown) and Jean Su (at UCI) for superb research assistance, manuscript preparation, and student insights; Maike Kotterba (CTLS) and Charlene Anderson (UCI) (for administrative support) and Peter Reilly, Clark Freshman, and Bob Bordone for mentees who have become true peers, colleagues, and friends in this work we all do.

Lela thanks Nicole and Peter for constant support (particularly Nicole's technical support) and research assistants Halley Anolik and Dan Liston who did excellent work with page proofs.

Andrea (and the rest of us) thanks Carrie Kratochvil who was there at the birth of this book and has been our constant star of minding, managing, and maneuvering this edition to completion. She also thanks research assistants Erica Hayden, Erin Naipo, Amanda Tofias, Ben Scott, and Andrea Thompson for their excellent work.

Jean thanks her family for their tolerance and research assistants Kimberly DelMonico, Kathleen Wilden, and Will Thompson for their excellent work.

All of us thank Aspen Publishers (again), especially Melody Davies who started with us, helped us with kindness and appreciation, and we hope is now enjoying retirement, John Devins who manages us, Troy Froebe who manages our manuscript, Tracy Metivier for permissions and related editorial work, and Enid Zafran for indexing.

We thank our students for teaching us, our colleagues for supporting and critiquing us, and most importantly, our families who continue to not only support us, but to love us, for which we are all eternally grateful.

Finally, all of us thank each other for continuing to work, learn, and collaborate with each other—often from scattered corners of the world as we continue to spread our hopes and dreams for a more peaceful and just world.

Carrie J. Menkel-Meadow
Lela Porter Love
Andrea Kupfer Schneider
Jean R. Sternlight

November 2010

Preface to the First Edition

This book is inspired by our conviction that study of a variety of different processes of dispute resolution, what we here call "process pluralism," will enable the lawyers of the future to be more creative and effective in their legal problem solving. We subtitle this book "Beyond the Adversarial Model" because we believe that while litigation, and the adversarial process that inspires it, has its place in the legal order, modern life requires additional processes that better meet the needs of parties in conflict, as well as of the larger societies within which legal and other disputes occur. We believe that these other processes will produce qualitatively better solutions, improve relationships between parties, and deliver both justice and peace, both effectively and meaningfully. We also care about efficiency, of course, but for us, that value must often bow to the others.

Two of us are of the founding generation of "alternative dispute resolution" (a field many now call "appropriate dispute resolution" or simply "dispute resolution"); the other two of us came fast behind with specialized knowledge of several of the processes we study in this book. We have all been teaching these processes for many years and thought it time to enter the field with a new textbook. (Note that we did not say "casebook," as "cases" are not all that our field is about.) This book is organized to provide a comprehensive treatment of the field of dispute resolution, whether taught with skills components (and use of the many simulations, role-plays, and problem sets found in the Teacher's Manual) or as a survey of the field's theoretical, practical, ethical, legal, or policy issues.

We begin with a theoretical and historical introduction to the field of dispute and conflict resolution, introducing readers to the basic concepts and their creative developers and pointing out innovations in social and legal problem solving. Important theorist and practitioner Professor Lon Fuller, whom we call "the jurisprude of ADR," introduces us to the idea of "process integrity"—the evaluation of each dispute resolution process for its own logic, function, purpose, and morality—a theme we follow throughout the book.

We then turn to the three foundational processes of dispute resolution: negotiation, mediation (as facilitated negotiation), and arbitration (party controlled adjudication). Each process is studied in three separate chapters. The first focuses on the concepts, frameworks, and approaches characterizing different conceptualizations of the process; another explores the skills and practices needed to conduct that process; and a third examines the legal, ethical, and policy issues the process raises. This section of the book is primarily concerned with how lawyers (whether as negotiators, mediators, representatives in mediation and arbitration, or arbitrators) can more effectively solve their clients' problems and the problems of those with whom their clients interact.

Each of these processes has become more complex, both in study and in practice, since the modern field was founded about thirty years ago. To help students cope with that complexity, we present materials for practice (role-plays and simulations are provided in the Teacher's Manual); for analysis (questions and problems are posed in the text's Notes and Questions sections, following each of the readings, drawn from law, social science, popular culture, and examples of the processes in use); and for speculation on future dispute resolution designs. Throughout these chapters, we focus on the multiple roles that lawyers can play and on the importance of the interaction, consultation, and participation lawyers should have with the parties and clients whose disputes and conflicts they are hoping to help resolve. We also suggest more active roles for parties and clients in participating with lawyers in the resolution of their own issues and problems. Our conception of these roles goes beyond what many have suggested before. We maintain that participation, empowerment, creativity, and self-determination are important values in the successful and satisfying resolution of disputes and conflicts.

Beyond the foundational processes, this book goes on to explore the sophisticated adaptations of these basic processes sometimes required by modern life. Beginning with Part III, we explore how the basic processes combine to form hybrid processes; how the addition of multiple parties and the introduction of more complex issues change our understanding of how these processes can be used; how we might anticipate and avoid disputes by using conflict resolution in transaction planning and contracts; and how international conflicts may differ from or require adaptation of the processes commonly used in domestic legal disputes.

Dispute resolution is no longer just about avoiding or settling lawsuits. It should be thought of before relationships are formed, throughout their duration, and then, if necessary, when things go bad. Since various forms of ADR have now been in use for at least three decades, we are in a position to present some important critiques of and challenges to ADR's use. A separate chapter in this text therefore asks practitioners and students to consider how the claims of dispute resolution processes in different fora can be properly assessed and evaluated. Our concluding chapter examines the issues involved in counseling clients on the most appropriate process to use to resolve their disputes and conflicts and to plan transactions.

Our goal in this book is to help you as lawyers and future lawyers to be as well educated and informed as possible about effective options for dispute resolution. From this basis, you will be better prepared to advise your clients about the many ways they can go about their dealings with others, both when putting things together and, sadly, when dealing with the consequences of relationships that fall apart.

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This book is the culmination of many years of study, teaching, research, and writing by all of us, and we have many intellectual, personal, and work-related debts. We cannot begin to acknowledge all of those debts, but we would like to recognize a few.

First, our intellectual sources. In some ways, the field or "movement" of ADR is a continuation of earlier schools of legal thought, including both Legal Realism and the Legal Process school of the 1950s (see Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law [1958, reissued in 1994, edited by Professors William N. Eskridge, Jr., and Philip P. Frickey]), both of which saw legal doctrine as insufficient to explain what lawyers did and how law is made, enforced, and lived. Both approaches sought to add people and processes to the study of law and its operations. The Law and Society field added empirical study of dispute processes by sociologists, anthropologists, psychologists, political scientists, and economists to the work of legal scholars, broadening the disciplinary reach of dispute processing studies during a period of both domestic and international conflict and ferment.

The 1960s and 1970s saw a tremendous explosion of legal rights, with many more laws added to the books than could easily be enforced in courts, no matter how actively managed. Those decades were further characterized by political movements that encouraged people with legal problems or issues to participate directly in the system, diminishing the involvement of professionals.

At the same time, two different schools of thought arose questioning the adequacy of lawsuits and traditional adversarialism to solve all social and legal problems. One group was concerned about finding qualitatively better solutions to conflicts and increasing parties' participation, while the other group was more concerned about efficiency and the costs in money and time of so much litigation. These two movements coalesced at a famous conference held in 1976—"Causes of Popular Dissatisfaction with the Administration of Justice"—and a speech delivered there by Professor Frank Sander officially launched the field of ADR. Concurrently, some of us (including the authors of this book) asked lawyers to learn to "problem solve" rather than to "beat or best the other side" in legal negotiations (Menkel-Meadow, 1984).

The study of negotiation was institutionalized as several law schools began to teach and study negotiation processes related to a variety of settings, producing a founding generation of negotiation scholars, many of whose works are cited and explored in the pages that follow. The concept of third party neutrals was added to facilitate negotiation, and two of us were early mediators when mediation found its place in the law school curriculum. The adaptation of the mediation process

to legal disputes and conflicts is also chronicled in this book, with excerpts from those who founded and elaborated that field as well.

The study, practice, and teaching of first negotiation and then mediation were part of another important movement in legal education: clinical legal education, which seeks to teach law students how to behave as well as to think like lawyers. While litigation was the focus of most early clinical programs, frustration with enforcement of winning lawsuits or with the inefficacy of lawsuits to effect both individual and social change led some early clinicians to look for other methods of legal and social problem solving, all while teaching law students to understand that there are many ways to serve one's clients and solve legal problems. The clinical movement, like the study of ADR, is an "experiential" field, and we also owe intellectual debts to those, like Donald Schön and Chris Arygris, who developed, in professional education, the concepts and practices of "theories-in-use." This book elaborates theories of dispute resolution, in various forms, and asks students to put those theories into use immediately, while learning about them.

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