

Preface

No matter what kind of law you choose to practice, we are confident that the topics covered in this book will play a central role. Litigators in modern times resolve far more cases through consensual processes than through trial. Transactional lawyers negotiate the terms of deals. Family lawyers and their clients routinely attempt to mediate agreements before turning to a court to impose the terms of a parenting plan or a division of marital assets. Defense attorneys and prosecutors spend considerable energy negotiating plea agreements. Estate planners and probate attorneys anticipate (and sometimes clean up after) disputes that arise following the death of a family member or business partner. Regulatory agencies often engage in negotiated rulemaking. Court administrators routinely direct cases away from traditional litigation paths, in favor of voluntary alternative dispute resolution mechanisms. Arbitration clauses are commonplace in commercial contracts, employee handbooks, and consumer agreements. And so on. In short, alternative dispute resolution is everywhere in the practice of law.

Despite its importance, the law of alternative dispute resolution often finds itself scattered throughout a range of courses. Your Contracts class will teach you about the law of fraud and unconscionability. Your Ethics class will teach you about your duty to advise your client about settlement opportunities and the boundaries of deception. Your Trial Practice class will teach you about the integration of settlement talks into the cadence of modern litigation. And entire law school courses (like Negotiation or Mediation or Arbitration) focus on specific alternative dispute resolution processes. Each of these is important. But none of these courses fully paints the legal landscape within which alternative dispute resolution occurs.

This book aims to provide a comprehensive view of that legal landscape, and we are delighted to offer it in the Examples and Explanations format. Much of alternative dispute resolution is about *practice*— the application of principles and ideas to concrete circumstances. In what circumstances can negotiators find opportunities for creative settlement? What are the boundaries of legally acceptable behavior by negotiators? What factors influence negotiators' decisions? What constraints and opportunities does mediation present? Under what circumstances are alternative dispute resolution conversations confidential? To what extent can disputants be diverted from traditional litigation processes? What powers does a court have to enforce or avoid alternative dispute resolution mechanisms and their outcomes? How does the Supreme Court continue to define and modify the enforcement of

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arbitration clauses? What ethical obligations inform attorneys in alternative dispute resolution contexts?

Understanding the practice of alternative dispute resolution requires an understanding of the legal contexts in which these processes take place. This book, therefore, offers:

- 1 Clear, readable, and up-to-date overviews of important and complex legal doctrines and analytic frameworks, including:
 - Legal ethics relating to alternative dispute resolution, including those rules governing the role of lawyers in alternative dispute resolution
 - The psychology of negotiators' decision making, the economics of deal structures, and the decision analytic approach to alternative dispute resolution
 - The Uniform Mediation Act and state confidentiality laws
 - The Federal Arbitration Act, federal preemption, contractual challenges to arbitration, and the evolving federal policy favoring arbitration
 - The three primary ADR processes and their relationships to each other and to the courts
 - Court-mandated alternative dispute resolution and its requirements, forms, and limits
- 2 Practice applying legal concepts and analytic frameworks to specific alternative dispute resolution circumstances
- 3 A logical organization that traces the coverage in most survey courses on alternative dispute resolution
- 4 Liberal use of visual aids, diagrams, charts, and conceptual illustrations

Thousands of law students have read and commented on drafts and the first four editions of *Dispute Resolution: Examples and Explanations*. In a range of courses, including Dispute Resolution, Negotiation, Mediation, Arbitration, and even Civil Procedure, we have offered these materials as a mechanism to enhance our students' understanding of the law. Our students have taught us how to explain the law of alternative dispute resolution, how it works, and why it sometimes doesn't. It is no exaggeration to say that our students helped to write this book. For that reason, we are confident it is tailored to students' interests and needs.

We hope that this book will help you prepare effectively both for the Bar exam and for practice. Many states are moving toward practice-focused bar exams, and the NextGen Bar Exam, in particular, will focus on client counseling, advising, negotiation and alternative dispute resolution—all topics covered in depth in this text. More importantly, the NextGen bar intends to assess not simply whether a future lawyer understands the law, but also how to apply it in practice. In particular, the exam will require a

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future lawyer to successfully identify lawyering strategies within the lawyer-client relationship, including identifying a client's goals, interests and constraints. Our focus on interviewing, negotiation, mediation, arbitration and counseling clients will provide users with an excellent foundation not only in alternative dispute resolution courses, but also when they prepare for and take the NextGen Bar.

Alternative Dispute resolution is a permanent and increasingly important component of legal education and law practice. We hope that you find this book helpful as you study its contours.

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