

NEGOTIATION

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ASPEN CASEBOOK SERIES

NEGOTIATION

Processes for Problem Solving

Third Edition

Carrie J. Menkel-Meadow

Distinguished and Chancellor's Professor of Law and Political Science
University of California, Irvine School of Law and
A.B. Chettle Professor of Law, Dispute Resolution and
Civil Procedure (Emerita)
Georgetown University Law School

Andrea Kupfer Schneider

Professor of Law, Director, Marquette University Institute for Women's
Leadership, and Director, Dispute Resolution Program
Marquette University Law School

Lela Porter Love

Professor of Law and Director, Kukin Program for Conflict Resolution and the
Cardozo Mediation Clinic
Benjamin N. Cardozo Law School, Yeshiva University



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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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Preface to Third Edition

As we go to press on this new edition, the world is renegotiating *everything* in the midst of a global pandemic. How are individuals, families, governments, private companies, organizations, health providers, universities, and everyone “renegotiating” the terms of their existences and relationships? We are all confronting the difficult problems of contagious disease, health care adequacy, employment and massive unemployment, economic depression and recession, reduction of warm human contact, online education, work, family care, and cessation or great reduction of long-distance travel and in-person meetings. We see stark evidence of massive inequalities and differences in how this emergency is affecting people and groups of people. And we see great variations in ideas for dealing with problems, developing resilience for survival, and adapting to create new forms of social interaction, economic development, and human flourishing. There is also more conflict as our value differences and economic disparities are exposed in these unusual moments.

The first edition of this book (2005) was written in the continuing shadow of 9/11 and the global efforts in antiterrorism; the second edition (2014) followed on the heels of the 2008–10 economic recession and ongoing conflicts in the world, many still with us (Syria, Palestine-Israel, Iran, and North Korea), and some new or resurgent ones (relations with China and Russia—new forms of “cold” war, instability in many regimes in the Middle East and Africa), not to mention extreme polarization in our own polity.

So each edition of this book was written as human beings faced a set of “problems” at interpersonal, personal, legal, economic, political, organizational, and international levels with impacts on individuals, families, corporations, companies, governmental institutions, and both profit and nonprofit organizations. Problems need to be solved by people, whether the problems are human-generated (war, conflicts over identity and resources, climate change) or externally generated (disease), and when people need to solve problems, they need to work together. We cannot do it alone.

So, as ever, this textbook is designed to teach you how to work with others to solve problems by negotiating. You will learn techniques to communicate effectively, to identify what we need from each other and what we can give to each other, and to find creative solutions to problems—solutions you may never have dreamed existed. You will discover how to make lemonade out of lemons, to expand pies and find fresh resources, to invent new products and opportunities, to provide services in a new way, and to always learn and adapt to dynamically changing situations. This is negotiation in life, in law, and dare we say, in love!

The current coronavirus crisis in which we finish this text is just another slice of human diversity. Some see problems and want to solve them—inventing new medical devices; sewing masks; caring for those who need help; providing new forms of financial aid; inventing different ways to deliver food, education, medical treatment (telemedicine), and “contactless” economic transactions. Others want to “defeat the hidden enemy” as if brute force and sheer desire could kill a biological organism and allow us to “go back to where we were.” This is the stuff of this text: How do we approach problems and each other? Do we assume scarce resources, fixed pies, bad motives on the parts of others, and a competition of “all against all”? Or do we see both the need to work together collaboratively to solve problems and the opportunity to totally rethink and reconfigure how we do things? This is the creative material and the choice presented by negotiation.

The text is written primarily for use in legal education and law schools, but it can be used in any setting where people are learning how to work productively with each other (and how to spot and deal with those who are being counterproductive). We have a mission here: Though we treat and teach “distributive” or adversarial bargaining (currently in some ascendancy among some dangerous political leaders and ruthless profit-seekers, as well as aggressive lawyers and some social combatants), our goal is to teach how to negotiate *effectively* to work *with* people, *for* people—to enhance joint gain, to create more “surplus value,” and to solve problems. There are basic concepts and models to learn. Knowing what a negotiation problem is about (the “res,” or stakes) and who is involved affects the choices of behaviors we use. We want to teach you to be contextually sensitive and cognitively astute—never a “patsy” or a “mark,” but also never a thoughtless forceful bully. What is the appropriate framework for dealing with a particular problem and a particular set of circumstances and people for trying to move towards agreement? An agreement may be necessary for things to move forward anytime we need anyone else to accomplish something or, in our current world, to prevent harm.

This edition moves some things around to make instruction more consistent with how people negotiate. First, what are the frameworks, models, and approaches in our own heads? Which are appropriate for what kind of problem? And how might our counterparts conceive of the problem in their heads? All negotiation involves the parties’ different perspectives on how they see the negotiation frame. Next, how do we work with clients, or any principals, if we are agent-negotiators, to find out how they conceive of the problem to be solved or the transaction to be made? How do we counsel and communicate about how we should go about and prepare for the interactions with those we need to negotiate with? That is *Part I: Concepts and Models of Negotiation*, with appropriate uses of client interviewing,

counseling, and preparation—all before we “get to the table” of any actual negotiation. As most scholars and practitioners of negotiation know, so much that determines what happens in an actual negotiation can be seen in what happens “away from the table”—before, during, and after the parties actually “meet” (and how they actually meet is now very different, including in electronic, virtual, and asynchronous media). Next we turn in *Part II: Skills for Negotiation* to what most negotiation courses start and end with—the *Skills* that are necessary to be effective negotiators: gathering information; asking questions; assessing trust; developing reputations; analyzing power and psychological dynamics; understanding emotions, moods, and the situational variations in negotiations; making concrete proposals; being creative; being persuasive (and in law, using legal arguments and endowments); dealing with cognitive, social, class, gender, race, ethnicity, and other challenges to negotiations that are not conducted (almost never) under conditions of totally equal bargaining conditions. In *Part III: Law and Ethics in Negotiation*, we treat the particular issues in legal negotiations—the roles of *Law* (fraud, enforcement, contract making) and *Ethics* (both formal in discipline for professional unethical acts or omissions and less formal, but just as important, for personal morality, responsibility, and accountability for negotiation choices). Finally, in *Part IV: Complex Negotiation Processes*, we turn to *Complexity in Negotiations*—multiple parties, multiple issues, international negotiations, and the use of mediators to facilitate and assist negotiators who need help working through impasses or who seek a third party to help with brainstorming ideas or managing complex processes.

The text has been streamlined a bit, shortened to make each chapter possible for a single week of class (whether taught twice a week, as we prefer, or in a single longer class session). Each chapter contains shaded Problem Boxes to make material immediately translatable for use, class conversation, and group exercises. Like most negotiation teachers, we teach experientially, and the accompanying Teacher’s Manual (posted at <https://www.AspenPublishing.com/MenkelMeadow-Negotiation3>) contains a large collection of role-plays, simulations, problem sets (both short in-class projects and longer iterative, client-intensive negotiations). We are always available for consultations about uses of the text and problems.

So, what is new? This edition draws on fresh insights on new media (online and email negotiations, as we suspect some will now teach this course online!), and draws extensively from the recent work on negotiation developed at so many negotiation and ADR (alternative/appropriate/accessible dispute resolution) meetings, newly published research and articles in the multi-volume *Negotiation Desk Reference* (Chris Honeyman and Andrea Kupfer Schneider, eds. DRI Press 2017), and the continuing new work published in the *Negotiation Journal* (of Harvard’s Program on Negotiation, where Carrie Menkel-Meadow is an editor). We have all taught extensively with these materials in many countries and hope they will be user friendly to explore the fundamentals in negotiation and also to explore the cultural variations that may exist.

We think all human beings and certainly all lawyers benefit from studying how to negotiate. We all do it every day but are often unconscious of why and how we are doing it. The materials in this book are essential for any thoughtful professional who wants to improve. We also hope the study of negotiation aids in conflict resolution

and problem solving generally in our society, and we hope that the final chapter will encourage all who continue to need help with negotiation to seek mediational help. Our other texts in this series, *Dispute Resolution: Beyond the Adversarial Model* (3d. 2019) and *Mediation: Practice, Policy and Ethics* (3d. 2020) provide additional guidance on how to do and think about these things.

★ ★ ★

We continue to be appreciative of our home institutions, where we are supported in our teaching and research that produces these texts: the University of California at Irvine Law School, Marquette University Law School, and the Benjamin N. Cardozo Law School.

Carrie thanks her colleagues on the editorial board of the *Negotiation Journal*, her colleagues in the Senior Mediators Group, and her growing group of colleagues, some former students, now practitioners and teachers of negotiation and mediation around the world, including Carlos Ruffinelli, Ana Silva, Carlos Silva, Renzo Parodi, Ana Carolina Viera Riella, Clark Freshman, Peter Reilly, Alain Verbeke, Orna Rabinovitz-Einy, Lukasz Rozdeiczer, Kondi Kleinman, Emmanuel Vivet, Maria Moscati, Michael Palmer, Amy Cohen, Bob Bordone, and Chris Honeyman. She expresses her long-standing appreciation for other “founders” and mentors in the field, both those now gone—Howard Raiffa, Roger Fisher, Frank Sander, Margaret Shaw, Wally Warfield—and those still inspiring—Jim Sebenius, Larry Susskind, Carol Liebman, Susan Podziba, Nancy Rogers, Deborah Kolb, Mary Rowe, Mike Wheeler, Howard Gadlin, Jennifer Brown, Stephanie Smith, Jan Martinez, Paul Brest, and Melanie Greenberg. She thanks her committed and dedicated research assistants on this volume from UCI Law (#soUCI!!), Francesca Egger, Amelia Haselkorn, Lynda Bui, and Alex Cadena, and a continually growing group of UCI law students interested in learning negotiation and mediation and hoping to make the world a better place through the Global Justice Summit. Carrie thanks John Arden for problem solving, research assistance, a generous soul for putting up with his fellow Penn Law Alum stories of “yore,” and faculty assistance par excellence. And very special thanks to librarian Dianna Sahhar, who finds everything in record time and with research skills unsurpassed!

Andrea’s recognition must start with Chris Honeyman, with whom she co-edited two new volumes on negotiation in the last few years, *The Negotiator’s Desk Reference* and *Negotiation Essentials*. This was a Herculean (but also wonderful) task, harnessing (again) another 100 colleagues from around the world from a multitude of disciplines to contribute the best and most innovative thinking in negotiation. She is eternally grateful to the contributors to those undertakings. Readers here are the beneficiaries of excerpts that really push the field of negotiation forward. Thank you to those we’ve excerpted here and those we haven’t—all of it educated us in one way or another to keep advancing the field. Andrea also thanks her co-editors, co-authors, co-bloggers, writing partners, and writing workshop retreat buddies for all of their support, comments, edits, and suggestions as this new edition was coming to fruition—Cynthia Alkon, Jennifer Brown, Sarah Cole, Deborah Eisenberg, Jill Gross, Art Hinshaw, Michael Moffitt, Kelly Browe Olson, Peter Reilly, and Nancy Welsh. She thanks her research assistants on this edition—Margaret Spring, Taylor

Hansen, and Morgan Henson. And she also wants to note, with sadness, that this is the last book on which she can thank her amazing (now former) administrative assistant, Carrie Kratochvil.

Lela thanks her wonderful partners in this endeavor—Carrie and Andrea—who have done the lion's share of work on this book and who are the gurus of the modern negotiation field. They have been valiant and tireless partners for decades—for this and other volumes. Her negotiation teachers and inspirations have included Josh Stulberg, who brought her into the field of negotiation by passing on to her a first Negotiation course at NYU; Jack Hanna and Kitty Atkins, who know so much about perceiving what interests move people and how to leverage friendship into terrific projects; and colleagues around the world with whom she has built international projects through collaboration and negotiation—Jim Coben, Srđan Simac, Christian Hartwig, Eva Gedeon, Joerg Fette, Miki Alberstein, to name few. She thanks Krysta Hartley for her assistance—always cheerful and “can do.” She thanks her students who have gone on to be teachers and who teach her now: Adam Berner, Donna Erez-Navot, Brian Farkas, Glen Parker, Robyn Weinstein, Dan Weitz (to name a few). And, if you have ever tried to negotiate with a donkey, you will appreciate how very much she has learned from negotiating with an exasperating donkey, named Bandit. Thanks to him, too.

For this edition, all of us especially thank the many of you (noted in the Acknowledgements) who worked with us to keep your work in this edition or allowed us to use new things, of great value to all students of negotiation, with waived or reduced permission fees, so we could continue to share your great contributions to our field—now that is joint gain! We thank you and salute you gentle people, scholars, teachers, and great practitioners of negotiation.

We all thank Sarah Hains, Dena Kaufman, Teresa Horton, Michelle Humphrey, and amazingly, 20 years later, Susan Boulanger at The Froebe Group and Jordan Jepsen at Aspen Publishing for sheparding us through the continually changing production of the things we love—BOOKS!

We end by thanking each other—20 years now together working on these books and trying to solve the world's problems with our teaching, writing, and practices; with friendship, mutual learning, humor, and great negotiating (and mediating) skills; and also with appreciation to our co-authors on other editions of these books—our dear friends and colleagues—Jean Sternlight and Michael Moffitt and, of course, the irreplaceable Carrie Kratochvil who, after decades with us (and Andrea especially), has found a new home.

May you who read and use this book go forth and continue solving problems, resolving conflicts, creating transactions, making peace, and appreciating each other.

Stay safe and well, and please send us your comments and stay in touch.

*Carrie J. Menkel-Meadow
Andrea Kupfer Schneider
Lela Porter Love*

August 2020

Preface to Second Edition

As we complete work on the second edition of this text on Negotiation as a Process for Problem Solving, our world is full of conflict—both internationally and domestically, including a civil war in Syria, conflict with Russia over the Ukraine, continuing conflict (though the official “wars” are ending) in Afghanistan and Iraq, the Middle East and continuing violence in the search for democracy and stability in Africa, as well as ongoing gridlock among Democrats and Republicans over health care, immigration, affirmative action, guns, and other policy differences. We continue to believe that negotiating to solve problems, not only to “win” lawsuits and disputes, is the way forward for human beings to jointly inhabit our planet. We must talk to, communicate with, and persuade each other that it is in our common, not selfish, interests when we can achieve joint gain, search for creative ways to solve problems, and resolve our differences among us, whether in legal disputes and lawsuits, or more complex social and political issues. So we have updated our first edition to continue the education of law students, lawyers, judges, parties, politicians, diplomats, citizens, and others to learn how to negotiate with others, whether a single “adversary” on the “other side” of a dispute or a more complicated set of actors in multiparty, multi-issue matters.

Negotiation continues to be used to form contracts and treaties; resolve lawsuits; draft and pass legislation and administrative regulations; create new entities, organizations, and alliances; form relationships; and peacefully disengage when necessary. Negotiation is used to solve environmental disputes, family conflicts, political issues, employment grievances, and international crises. In the last decade more and more scholars in the fields of law, psychology, sociology, business, city planning, political science, anthropology, and decision sciences have conducted research in real-world and laboratory settings to increase our knowledge of how people come together and also what keeps them apart.

In this new edition we have altered the structure of this text in several important ways. We begin, as in the first edition, with a focus on the theories of conflict resolution and negotiation as a principal means of resolving conflict. But, as our book is

focused on solving problems, for clients, in legal matters, we then turn to the important aspect of negotiating with a client in mind, learning what the client's needs, interests, and objectives are, by interviewing, counseling, and determining what clients want and need from negotiation. We then explore the important interpersonal skills of listening to clients, to counterparts and learning how to prepare for negotiation, focusing on several different orienting frames for considering the "science and the art" of negotiation — to consider whether goals are to solve problems and use integrative methods, to seek individual gain, using more distributive methods or, as in most negotiations, to learn how to build behavioral methods from analyzing the complexity of mixed goals and motives in negotiations. We then turn to the specific behaviors that are needed to conduct successful negotiations, especially as lawyers are agents for principals, focusing on establishing trust, rapport, developing a reputation, and working with cognitive and intellectual, as well as emotional, aspects of working with others — both clients and counterparts. We address some common barriers to negotiation, drawing on much recent empirical work on social, cognitive, and cultural biases, and other distortions in information processing and negotiated agreements, and focus on some suggestions for moving past those barriers. As in our prior edition, we provide cases, rules, interpretations, and other materials on the laws governing negotiation behavior and agreements, and different ethical approaches to negotiation. Finally we explore the complexities of negotiation in multiparty, multi-issue, and international settings, when assumptions of bilateral or client-lawyer to client-lawyer negotiations may no longer accurately describe what occurs or may occur in complex negotiations. We conclude with an introduction to mediation, when parties may need to seek facilitated assistance for conducting negotiation.

Additional material in this edition focuses on some of the newer issues in negotiation, such as when negotiations are conducted online and not in person, consideration of when we should not negotiate at all, and what happens to negotiation concepts when the legal problems are encountered in complex class actions, mass torts, or international settings. Negotiation theory and practice is used to explore new uses of negotiated processes in larger scale decision making and deliberative democracy. Many new books and articles on the rapidly growing field of negotiation (and conflict resolution), with empirical studies and continued arguments about best approaches (whether assuming scarce resources to be divided or resources to be shared or expanded) are included here to update some of what we presented in the first edition. Though many continue to write about and study negotiation, we still believe that a basic orienting frame of:

Goal	Orientation	Behavior	Outcome(s)*
Maximize Own Gain	Adversarial	Competitive	Impasse, Stalemate; Win/Lose; Compromise, Split the Difference
Seek Joint Gains	Problem-Solving	Collaborative	Solved Problems; Expanded Resources; New Relationships

*Derived from Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 760 (1984).

helps us to orient our planning, conceptualization, and choice of behaviors to best solve the problems that clients present to us. Thus, we have organized our chapters around consideration of different models of negotiation that ask us to consider what our (and our clients') goals are before we select particular behaviors to achieve particular outcomes.

We have tried to make this edition more classroom user friendly — it is shorter than the earlier edition, with one chapter per week being one appropriate way to teach with the book. This edition uses a format of simple problem boxes, set off from the text, to be answered by students while reading, or in class, to encourage interactive use of the materials — asking questions and suggesting immediate application of the course readings. The updated Teacher's Manual (which will be available in password-protected form online for text users) provides suggested syllabi and suggestions for simulations, class exercises, and suggested "answers" to the problems. Following the format of the earlier edition, numbered footnotes follow those taken directly from the excerpts and those with symbols are those added by the editors for clarity and further explication. Each chapter contains a Further Reading section listing some additional major books and articles for that chapter to assist students in deepening their study of negotiation and assisting with bibliographic references for possible research papers and more practical advice in some specific areas.

We hope this new edition continues the trend of more and more law students studying negotiation in order to resolve disputes, create effective and efficient contracts, improve social and legal relationships, create new ideas, entities and organizations, all with the hope that knowing how to negotiate well will enhance human problem solving and flourishing social and political life.

★ ★ ★

We continue to be appreciative of our institutional homes for support, the University of California, Irvine, Marquette University Law School and Benjamin N. Cardozo Law School. Andrea Kupfer Schneider thanks the Dispute Resolution Program at Marquette, Lela Love is grateful to the Kukin Program for Conflict Resolution at Benjamin Cardozo Law School, and Carrie Menkel-Meadow is grateful to new colleagues in conflict resolution and political science at the University of California, Irvine, as well as old friends and colleagues at the Senior Mediators Group, the Program on Negotiation at Harvard, as well as at Georgetown University and colleagues at a variety of law faculties around the world where she has taught.

We thank Jean Sternlight, our fellow traveler and colleague in the work on our "big" ADR book, *Dispute Resolution: Beyond the Adversarial Model* (2d. 2011), which began this family of texts, which also now includes *Mediation: Practice Policy and Ethics* (2d. 2013). We thank many colleagues, mentors (some now sadly departed), as the first generation gives way to its successors, and friends in the field, former and present students, some now colleagues, users of the first edition of this book and many others who have offered comments and guidance over the years including, but not limited to, Roger Fisher, Frank Sander, Larry Susskind, Michael Wheeler, Deborah Kolb, Christopher Honeyman, Jennifer Gerarda Brown, Nancy Welsh, Carol Liebman, Orna Rabinovich-Einy, Stephanie Smith, Jan Martinez, James Coben, Giuseppe DePalo, Nancy Rogers, Melanie Greenberg, Bob Bordone,

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We especially want to single out those true educators and authors in our midst and on these pages who have given us permission to reprint their words for no or reduced cost (you know who you are). We hope to return the favor (reciprocal concessions?) if you ever ask us.

Once again, we end this beginning by thanking each other. What a collaboration over ten years now for us to read, teach, and work with each other to deepen our knowledge and experience, to grow new generations of negotiators and peace seekers, and to practice each day our own versions of the important skills we teach, negotiation, listening, persuading, mediation, teaching, and problem solving. As we worked on this book one of us lost a parent and another gained a grandchild. As John Paul Lederach has said, this work of peace seeking needs generations of commitment to see us through.

We hope you continue to learn from things in this book and please let us know if you have suggestions and reactions.

In peace,

*Carrie J. Menkel-Meadow
Andrea Kupfer Schneider
Lela Porter Love*

June 2014

Preface to First Edition

This book is the culmination of decades of work in a field that began with roots in other disciplines and is now an important part of the law school curriculum—as part of an intellectual and pragmatic movement to teach law students about what lawyers actually do.

When the senior author of this book was a legal services attorney over thirty years ago, she noticed that even when she was victorious in litigation—whether in class action law reform or individual cases—the litigation often would not solve the underlying problem presented by the parties to the formal legal dispute. She began to study how negotiated outcomes in a wide variety of matters often were able, through tailored, specific, and consensually arrived at resolutions, to do more for the parties than achieving a legal judgment, which still required enforcement. And so began a lifetime of study of the negotiation process as a problem-solving process for lawyers who were conventionally more oriented to “winning” cases for their clients than to solving clients’ underlying problems. This orientation to negotiation—solving problems—also, of course, includes the other work that lawyers do—creating transactions, entities, and new forms of legal reality (for example, constitutions, legislation, organizations, corporations, coops, condominiums, and unions).

The study and teaching of negotiation as a legal process is relatively new and derivative of work done in other disciplines, such as psychology, political science, economics, sociology, anthropology, and other hybrid fields, such as game theory and decision sciences (Carrie Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 Am. Bar. Found. Res. J. 905). Legal scholars first took note of negotiated processes in the law in the days of Legal Realism, the Legal Process school of the 1950s and 1960s (Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)), and in socio-legal studies, through empirical work done by researchers affiliated with the Law and Society movement,

which still flourishes today (and is complemented by new work in behavioral 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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Let us know what you think.

*Carrie Menkel-Meadow
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Marjorie C. Aaron. Client Science Advice for Lawyers on Counseling Clients Through Bad News and Other Legal Realities (2012). Oxford University Press. Copyright © 2012.

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Robert S. Adler and Elliot M. Silverstein, When David Meets Goliath: Dealing with Power Differentials in Negotiations, 5 Harv. Negotiation L. Rev. (2000).

James J. Alfini, “Trashing, Bashing, and Hashing It Out: Is This the End of ‘Good Mediation?’” Florida State University Law Review (1991). Florida State University College of Law. Copyright © 1991.

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Lisa Blomgren Amsler, “The Negotiator’s Role within a Dispute System Design: Justice and Accountability,” The Negotiator’s Desk Reference, Vol. 2 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017). DRI Press. Copyright © 2017.

Robert Axelrod, The Evolution of Cooperation (1984), Perseus/Hachette. Copyright © 1984.

Ian Ayres, “Further Evidence of Discrimination in New Car Negotiations and Estimates of Its Cause,” Michigan Law Review, Vol. 94 (1995). University of Michigan Law School. Copyright © 1995.

- John L. Barkai**, “How to Develop the Skill of Active Listening,” *The Practical Lawyer*, Vol. 30 (1984). American Law Institute Continuing Legal Education. Copyright © 1984.
- Max H. Bazerman & Margaret Neale**, *Negotiating Rationally* 26–30 (1992). Simon & Schuster/Free Press. Copyright © 1992.
- Richard Birke**, “Reconciling Loss Aversion and Guilty Pleas,” *Utah Law Review* (1999). SJ Quinney College of Law, University of Utah. Copyright © 1999.
- Jennifer Gerarda Brown**, “Creativity and Problem-Solving,” *Marquette Law Review*, Vol. 87 (2004). Marquette University Law School. Copyright © 2004.
- Jennifer Gerarda Brown**, “The Role of Hope in Negotiation,” *UCLA Law Review*, Vol. 44 (1997). UCLA School of Law. Copyright © 1997.
- Jennifer Gerarda Brown & Jennifer K. Robbennolt**, “Apology in Negotiation,” *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider, 2017). DRI Press. Copyright © 2017.
- Robert A. Baruch Bush & Joseph P. Folger**, *The Promise of Mediation: The Transformative Approach to Conflict* (rev. ed., 2005). Josey-Bass. Copyright © 2005.
- Jonathan R. Cohen**, “Adversaries? Partners? How about Counterparts? On Metaphors in the Practice and Teaching of Negotiation and Dispute Resolution,” *Conflict Resolution Quarterly*, Vol. 20 (2003). John Wiley & Sons. Copyright © 2003.
- Peter T. Coleman**, “Power and Conflict,” *The Handbook of Conflict Resolution* (M. Deutsch and P. Coleman eds., 2000). John Wiley & Sons. Copyright © 2000.
- Moty Cristal**, “Negotiation in a Low to No Trust Environment,” *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider, 2017). DRI Press. Copyright © 2017.
- Daniel Curran, James K. Sebenius, and Michael Watkins**, “Two Paths to Peace: Contrasting George Mitchell In Northern Ireland With Richard Holbrooke In Bosnia-Herzegovina,” *Negotiation Journal*, Vol. 20 (Oct. 2004). The President and Fellows of Harvard College. Copyright © 2004.
- Robert Dingwall and Carrie Menkel-Meadow**, *Negotiating Against a Script in Negotiation Essentials for Lawyers* (Andrea Kupfer Schneider & Chris Honeyman eds., 2019). © 2019 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Noam Ebner**, “Negotiation via Email,” *The Negotiator’s Desk Reference*, Vol. 2 (Chris Honeyman & Andrea Kupfer Schneider, eds., 2017). DRI Press. Copyright © 2017.
- Roger Fisher & Wayne H. Davis**, “Six Basic Interpersonal Skills for a Negotiator’s Repertoire,” *Negotiation Journal* (1987). The President and Fellows of Harvard College. Copyright © 1987.

- Roger Fisher, Elizabeth Kopelman & Andrea Schneider**, *Beyond Machiavelli: Tools for Coping with Conflict* (1996). Harvard University Press. Copyright © 1996.
- Roger Fisher, William Ury & Bruce Patton**, *Getting to Yes* (3rd ed., 2011). Houghton Mifflin Harcourt. Copyright © 2011.
- Roger Fisher, William Ury & Bruce Patton**, *Getting to Yes* (2d ed., 1991). Penguin Books. Copyright © 1991.
- Mary Parker Follett**, “Constructive Conflict,” *Mary Parker Follett—Prophet of Management: A Celebration of Writings from the 1920s* (Pauline Graham ed., 1995). The President and Fellows of Harvard College. Copyright © 1995.
- Clark Freshman, Adele Hayes & Greg Feldman**, “The Lawyer-Negotiator as Mood Scientist: What We Know and Don’t Know About How Mood Relates to Successful Negotiation,” *Journal of Dispute Resolution* (2002). University of Missouri School of Law. Copyright © 2002.
- Gary Friedman & Jack Himmelstein**, “Resolving Conflict Together: The Understanding-Based Model of Mediation,” *Journal of Dispute Resolution* (2006). University of Missouri School of Law in conjunction with the Center for the Study of Dispute Resolution. Copyright © 2006.
- Lon L. Fuller**, *Mediation—Its Forms and Functions*, *Southern California Law Review*, Vol. 44 (1971). USC Gould School of Law. Copyright © 1971.
- Eric Galton**, “Mediation of Medical Negligence Claims,” *Capital University Law Review*, Vol. 28 (2000). Capital University Law School. Copyright © 2000.
- Carol Gilligan**, *In a Different Voice: Psychological Theory and Women’s Development* (1982). Harvard University Press. Copyright © 1982.
- Ronald J. Gilson**, “Value Creation by Business Lawyers: Legal Skills and Asset Pricing,” *Yale Law Journal*, Vol. 94 (1984). Yale Law School. Copyright © 1984.
- Ronald J. Gilson & Robert H. Mnookin**, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,” *Columbia Law Review*, Vol. 94 (1994). Columbia Law School. Copyright © 1994.
- Dwight Golann & Eric E. Van Loon**, *Legal Issues in Consensus Building in The Consensus Building Handbook: A Comprehensive Guide to Reaching Agreement* (Lawrence Susskind, Sarah McKernan & Jennifer Thomas Larmer eds., 1999). SAGE Publications. Copyright © 1999.
- Michael Z. Green**, “Negotiating While Black,” *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017). DRI Press. Copyright © 2017.
- Philip H. Gulliver**, *Disputes and Negotiations: A Cross-Cultural Perspective* (1979). Elsevier. Copyright © 1979.
- Chris Guthrie, “Principles of Influence in Negotiation,” *Marquette Law Review*, Vol. 87 (2004). Marquette University Law School. Copyright © 2004.
- Philip J. Harter**, “Negotiating Regulations: A Cure for Malaise,” *Georgetown Law Journal*, Vol. 71 (1982). Georgetown University Law Center. Copyright © 1982.
- Art Hinshaw, Peter Reilly & Andrea Kupfer Schneider**, “Attorneys and Negotiation Ethics: A Material Misunderstanding?” *Negotiation Journal*, Vol. 29 (2013). The President and Fellows of Harvard College. Copyright © 2013.

Samuel P. Huntington, “The Clash of Civilizations?” *The International System After the Collapse of the East-West Order* (Armand Clesse, et al. eds., 1994). Springer Netherlands. Copyright © 1994.

Guy Itzhakov & Avi Kluger, “Changing the Other Parties’ Attitude with High Quality Listening,” *Negotiation Essentials for Lawyers* (Andrea Kupfer Schneider & Chris Honeyman, eds., 2019). © 2019 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Daniel Kahneman & Amos Tversky, “Conflict Resolution: A Cognitive Perspective,” *Barriers to Conflict Resolution* (Kenneth Arrow, et al. eds., 1995). W.W. Norton & Company. Copyright © 1995.

Chester L. Karrass, *The Negotiating Game* (1970). Harper Collins. Copyright © 1970.

Russell Korobkin, *A Positive Theory of Legal Negotiation* 88 *Georgetown Law Journal* (2000). Georgetown University Law Center. Copyright © 2000.

Russell Korobkin & Chris Guthrie, “Heuristics and Biases at the Bargaining Table,” *Marquette Law Review*, Vol. 87 (2004). Marquette University Law School. Copyright © 2004.

Stefan H. Krieger & Richard K. Neumann, Jr., *Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis: Fifth Edition* (2015). Wolters Kluwer. Copyright © 2015.

Phyllis Beck Kritek, *Negotiating at an Uneven Table: A Practical Approach to Working with Difference and Diversity* (1994). Jossey-Bass. Copyright © 1994.

Katherine R. Kruse, “Beyond Cardboard Clients in Legal Ethics,” *Georgetown Journal of Legal Ethics*, Vol. 23. Reprinted with permission of the publisher, Georgetown Journal of Legal Ethics © 2010.

David A. Lax & James K. Sebenius, “Interests: The Measure of Negotiation,” *Negotiation Journal*, Vol. 2.

David A. Lax & James K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (1986). President & Fellows of Harvard College. Copyright © 1986.

Warren Lehman, *The Pursuit of a Client’s Interest*, *Michigan Law Review*, Vol. 77 (1979). University of Michigan Law School. Copyright © 1979.

Roy Lewicki, “Trust & Distrust,” *Negotiation Essentials for Lawyers* (Andrea Kupfer Schneider & Chris Honeyman, eds., 2019). © 2019 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Lela P. Love, “Glen Cove: Mediation Achieves What Litigation Cannot,” *Consensus*, Vol. 20 (Oct. 1993). MIT-Harvard Public Dispute Program. Copyright © 1993.

- David Luban**, *Settlements and the Erosion of the Public Realm*, Georgetown Law Journal, Vol. 83 (1995). Georgetown University Law Center. Copyright © 1995.
- Michael Meltsner & Philip Schrag**, *Negotiation, Public Interest and Advocacy: Materials for Clinical Legal Education* (1974). Little, Brown and Company. Copyright © 1974.
- Carrie Menkel-Meadow**, “Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?” *Harvard Negotiation Law Review*, Vol. 6 (2001). Harvard Law School. Copyright © 2001.
- Carrie Menkel-Meadow**, “Compromise, Negotiation & Morality,” *Negotiation Journal*, Vol. 26 (2010). The President and Fellows of Harvard College. Copyright © 2010.
- Carrie Menkel-Meadow**, “Conflict Theory,” *Encyclopedia of Community: From the Village to the Virtual World* (Karen Christensen & David Levinson eds., 2003). SAGE Publications. Copyright © 2003.
- Carrie Menkel-Meadow**, “Deconstructing Henry: Negotiation Lessons from Kissinger’s Career,” *Negotiation Journal*, Vol. 35, No.3 (2019). The President and Fellows of Harvard College. Copyright © 2019.
- Carrie Menkel-Meadow**, “Ethics, Morality and Professional Responsibility in Negotiation,” *Dispute Resolution Ethics: A Comprehensive Guide* (Phyllis Bernard & Bryant Garth eds., 2002). Copyright © 2013.
- Carrie Menkel-Meadow**, “Feminist Discourse, Moral Values and the Law—A Conversation,” *Buffalo Law Review*, Vol. 34 (1985). State University of New York University at Buffalo School of Law. Copyright © 1985.
- Carrie Menkel-Meadow**, “Introduction,” *Mediation: Theory, Policy and Practice* (2000). Ashgate Pub. Ltd. Copyright © 2000.
- Carrie Menkel-Meadow**, “Introduction,” *Multi-Party Dispute Resolution, Democracy and Decision Making* (2012). Ashgate Publishing. Copyright © 2012.
- Carrie Menkel-Meadow**, “Know When to Show Your Hand,” *Negotiation Newsletter*, Vol. 10 (June 2007). The President and Fellows of Harvard College. Copyright © 2007.
- Carrie Menkel-Meadow**, *Public Access to Private Settlements: Conflicting Legal Policies, 11 Alternatives to the High Cost of Litigation* (1993). Copyright © 2013.
- Carrie Menkel-Meadow**, “Roots and Inspirations: A Brief History of the Foundations of Dispute Resolution,” *The Handbook of Dispute Resolution* (Michael L. Moffitt & Robert C. Bordone, eds., 2005). John Wiley and Sons. Copyright © 2005.
- Carrie Menkel-Meadow**, “The Art and Science of Problem Solving Negotiation,” *Trial Magazine* (June 1999). American Association for Justice. Copyright © 1999.
- Carrie Menkel-Meadow**, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 Nev. L.J. (2005). Copyright © 2005.
- Carrie Menkel-Meadow**, “The Morality of Compromise,” *The Negotiator’s Desk Reference*, Vol. 2 (Chris Honeyman & Andrea Kupfer Schneider, 2017). DRI Press. Copyright © 2017)

- Carrie Menkel-Meadow**, “The Trouble with The Adversary System in A Postmodern, Multicultural World,” *William & Mary Law Review*, Vol. 38. (1996). The Marshall–Wythe School of Law at the College of William & Mary. Copyright © 2005.
- Carrie Menkel-Meadow**, “Toward Another View of Legal Negotiation: The Structure of Problem Solving,” *UCLA Law Review*, Vol. 31 (1984). UCLA School of Law. Copyright © 1984.
- Carrie Menkel-Meadow**, “What’s Fair in Negotiation? What is Ethics in Negotiation?” *What’s Fair: Ethics for Negotiators* (Carrie Menkel-Meadow & Michael Wheeler eds., 2004). Jossey-Bass. Copyright © 2004.
- Robert H. Mnookin**, “When Not to Negotiate: A Negotiation Imperialist Reflects on Appropriate Limits,” *University of Colorado Law Review*, Vol. 74 (2003). The University of Colorado Law School. Copyright © 2003.
- Robert Mnookin**, “Why Negotiations Fail: An Exploration of Barriers to Conflict Resolution,” *Ohio State Journal on Dispute Resolution*, Vol. 8 (1993). The Ohio State University Moritz School of Law. Copyright © 1993.
- Robert H. Mnookin, Scott R. Peppet & Andrew S. Tulumello**, *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (2000). Harvard University Press. Copyright © 2000.
- Michael Moffitt**, “Disputes as Opportunities to Create Value,” *The Handbook of Dispute Resolution* (Michael L. Moffitt & Robert C. Bordone eds., 2005). John Wiley & Sons. Copyright © 2005.
- Melissa L. Nelken**, “Negotiation and Psychoanalysis: If I’d Wanted to Learn About Feelings, I Wouldn’t Have Gone to Law School,” *Journal of Legal Education*, Vol. 46 (1996). Association of American Law Schools. Copyright © 1996.
- Scott R. Peppet**, “Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?” *Ohio State Journal on Dispute Resolution*, Vol. 19 (2004). The Ohio State University Moritz College of Law. Copyright © 2004.
- Scott Peppet**, “Six Principles for Using Negotiating Agents to Maximum Advantage,” *The Handbook of Dispute Resolution* (M. Moffitt & R. Bordone, eds., 2005). John Wiley & Sons. Copyright © 2005.
- Scott R. Peppet & Michael L. Moffitt**, “Learning How to Learn to Negotiate,” *The Negotiator’s Desk Reference*, Vol. 1 (eds. Chris Honeyman and Andrea Kupfer Schneider). DRI Press. Copyright © 2017.
- Linda L. Putnam**, “Challenging the Assumptions of Traditional Approaches to Negotiation,” *Negotiation Journal*, Vol. 10 (1994). The President and Fellows of Harvard College. Copyright © 1994.
- Robert D. Putnam**, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *Double-Edged Diplomacy: International Bargaining and Domestic Politics*. University of California Press. Copyright © 1993.
- Peter Reilly**, “Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence,” *Negotiation Journal*, Vol. 21 (2005). The President and Fellows of Harvard College. Copyright © 2005.

- Peter Reilly**, “Was Machiavelli Right? Lying in Negotiation and the Art of Defensive Self-Help,” *Ohio State Journal on Dispute Resolution*, Vol. 24 (2009). The Ohio State University Moritz School of Law. Copyright ©2009.
- Leonard L. Riskin**, *Mediator Orientations, Strategies and Techniques, 12 Alternatives to the High Cost of Litigation* (1994). John Wiley & Sons. Copyright © 1994.
- Lee D. Ross**, “Reactive Devaluation in Negotiation and Conflict Resolution,” *Barriers to Conflict Resolution* (Kenneth Arrow, et al. eds., 1995). W.W. Norton & Company. Copyright © 1995.
- Rick Ross**, “The Ladder of Inference” from *The Fifth Discipline Fieldbook: Strategies and Tools for Building a Learning Organization* by Peter M. Senge, Art Kleiner, Charlotte Roberts, Richard B. Ross, Bryan J. Smith. Copyright © 1994 by Peter M. Senge, Art Kleiner, Charlotte Roberts, Richard B. Ross, Bryan J. Smith. Used by permission of Doubleday, an imprint of the Knopf Doubleday Publishing Group, a division of Penguin Random House LLC. All rights reserved.
- Jeffrey Z. Rubin & Frank E.A. Sander**, “Culture, Negotiation, and the Eye of the Beholder,” *Negotiation Journal*, Vol. 7 (1991). The President and Fellows of Harvard College. Copyright © 2019.
- Jeswald W. Salacuse**, “Ten Ways That Culture Affects Negotiation Style: Some Survey Results,” *Negotiation Journal*, Vol. 14 (1998). The President and Fellows of Harvard College. Copyright © 1998.
- Frank E.A. Sander & Jeffrey Rubin**, “The Janus Quality of Negotiation: Dealmaking and Dispute Settlement,” *Negotiation Journal* (1988). John Wiley and Sons. Copyright © 1998.
- Thomas C. Schelling**, *The Strategy of Conflict* (1960, 1980). Harvard University Press. Copyright © 1960, 1980.
- Patrick J. Schiltz**, “On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession,” *Vanderbilt Law Review*, Vol. 52 (1999). Vanderbilt University Law School. Copyright © 2013.
- Andrea Kupfer Schneider**, “Book Review: Getting to NAFTA: A Review of Interpreting NAFTA,” *Berkeley Journal of International Law*, Vol. 17 (1999). University of California Berkeley School of Law. Copyright © 1999.
- Andrea Kupfer Schneider**, “Effective Responses to Offensive Comments,” *Negotiation Journal*, Vol. 10 (1994). The President and Fellows of Harvard College. Copyright © 1994.
- Andrea Kupfer Schneider**, “Measuring Success,” *Negotiation Essentials for Lawyers* (Andrea Kupfer Schneider & Chris Honeyman, 2019). American Bar Association. Copyright © 2019.
- Andrea Kupfer Schneider**, “Negotiating While Female,” *SMU Law Review* (2017). SMU Law Review Association. Copyright © 2017.
- Andrea Kupfer Schneider**, “Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style,” *Harvard Negotiation Law Review*, Vol. 7 (2002). Harvard Law School. Copyright © 2002.

- Andrea Kupfer Schneider**, “What’s Sex Got to Do With It: Questioning Research on Gender & Negotiation,” Nevada Law Journal, Vol. 9 (2019). William S. Boyd School of Law, University of Nevada, Las Vegas. Copyright © 2019.
- Andrea Kupfer Schneider & Noam Ebner, “Social Intuition,” in *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017). DRI Press. Copyright © 2017.
- Andrea Kupfer Schneider & David Kupfer**, *Smart & Savvy: Negotiation Strategies in Academia* (2017). Andrea Kupfer Schneider, David Kupfer. Copyright © 2017.
- Andrea Kupfer Schneider & Sean McCarthy**, “Hold the Phone,” *Negotiation Essentials for Lawyers* (Andrea Kupfer Schneider & Chris Honeyman, eds., 2019). © 2019 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- James K. Sebenius**, “Mapping Backward: Negotiation in the Right Sequence?” *Negotiation*, Vol. 7, No. 6 (June 2004). The President and Fellows of Harvard College. Copyright © 2004. Reprinted as “A Better Way to Negotiate: Backward” in *Working Knowledge*, July 26, 2004.
- Jeffrey Senger**, “Decisionmaking Under Uncertainty,” in *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider, 2017). DRI Press. Copyright © 2017.
- Jeffrey R. Seul**, “Settling Significant Cases,” *Washington Law Review*, Vol. 79 (2004). George Washington University Law School. Copyright © 2004.
- Daniel L. Shapiro**, “Emotions in Negotiation: Peril or Promise?” *Marquette Law Review*, Vol. 87 (2004). Marquette University Law School. Copyright © 2004.
- G. Richard Shell**, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (1999). Penguin Random House. Copyright © 1999.
- James H. Stark & Douglas N. Frenkel**, “Changing Minds: The Work of Mediators and Empirical Studies of Persuasion,” *Ohio State Journal on Dispute Resolution*, Vol. 28 (2013). The Ohio State University Moritz School of Law. Copyright © 2013.
- Jean R. Sternlight & Jennifer Robbennolt**, “Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients,” *Ohio State Journal of Dispute Resolution*, Vol. 23 (2008). The Ohio State University Moritz School of Law. Copyright © 2008.
- Douglas Stone, Bruce M. Patton, and Sheila Heen**. Excerpt(s) from *Difficult Conversations: How to Discuss What Matters Most* by Douglas Stone, Bruce M. Patton, and Sheila Heen. Copyright © 1999 by Douglas Stone, Bruce M. Patton, and Sheila Heen. Used by permission of Viking Books, an imprint of Penguin Publishing Group, a division of Penguin Random House LLC. All rights reserved.
- Cass R. Sunstein**, “Deliberative Trouble? Why Groups Go To Extremes,” *Yale Law Journal*, Vol. 110 (2000). Yale Law School. Copyright © 2000.
- Lawrence Susskind**, “An Alternative to Robert’s Rules of Orders for Groups, Organizations and Ad hoc Assemblies that Want to Operate by Consensus,”

The Consensus Building Handbook (Lawrence Susskind, Sarah McKearnan & Jennifer Thomas-Larmer, eds., 1999). SAGE Publications. Copyright © 1999.

Deborah Tannen, *The Argument Culture: Moving from Debate to Dialogue* (1998). Simon & Schuster. Copyright © 1998.

Thaves. “Frank and Ernest. ‘Of Course There Are Two Sides to Every Question, Ernie. Otherwise, You Wouldn’t Be Wrong All the Time’” (1994). Andrews McMeel Syndication. Copyright © 1994.

Kenneth Thomas, “Conflict and Conflict Management,” *Handbook of Industrial and Organizational Psychology* (Marvin D. Dunnette ed., 1976). Rand McNally College Publishing. Copyright © 1976.

Cathy H. Tinsely, Jack Cambria & Andrea Kupfer Schneider, “Reputations in Negotiation,” *The Negotiator’s Desk Reference*, Vol. 1 (Chris Honeyman & Andrea Kupfer Schneider, 2017). DRI Press. Copyright © 2017.

William Ury, *Getting Past No: Negotiating with Difficult People* (1991). Random House Business Books. Copyright © 1991.

Eric E. Vogt, Juanita Brown & David Isaacs, *The Art of Powerful Questions: Catalyzing Insight, Innovation, and Action* (2003). Whole Systems Associates. Copyright © 2003.

James J. White, “Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation,” *American Bar Foundation Research Journal*, Issue 1980. American Bar Foundation. Copyright © 1980.

Gerald Williams, *Legal Negotiation and Settlement* (1983). West Publishing Company. Copyright © 1983.

I. William Zartman, “The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments,” *Contemporary Peacemaking* (John Darby & Roger MacGinty eds., 2003). Palgrave Macmillan. Copyright © 2003.

PART I CONCEPTS AND MODELS OF NEGOTIATION

Chapter 1

Conflict Theory: Concepts of Conflict and Negotiation

A pessimist sees the difficulty in every opportunity; an optimist sees the opportunity in every difficulty.

—Winston Churchill

The skillful management of conflicts [is] among the highest of human skills.

—Stuart Hampshire, *Justice Is Conflict* 35 (2000)

People negotiate whenever they need someone else to help them accomplish their goals. Sometimes these negotiations are designed to create something new—a new relationship, partnership, entity, transaction—and other times negotiations occur because people are in conflict with each other and hope to resolve whatever dispute lies between them. In this book we offer you the latest materials on negotiating to resolve conflicts and disputes, on planning and negotiating for new transactions and entities, and on considering how negotiation could help you to create new solutions to law's and life's intractable problems.

We begin by introducing you to some basic concepts in conflict theory. The study of negotiation is now part of a larger field known as dispute resolution in law and conflict resolution in the social sciences. The field is concerned with studying and analyzing the human behaviors that enable people to work together to overcome differences, explore new solutions to problems, and seek joint gains from collaboration.

In conventional legal practice many people think of negotiation as necessarily competitive, with arguments about the meanings of law and doctrine, the significance of facts, and the allocation of scarce resources. In the course of reading this book we hope you will come to see that negotiations provide us with a rich opportunity to transform difficult conflicts and troublesome disputes into new relationships, creating value (in both monetary and nonmonetary forms) for all parties. Sometimes we just have to learn how to make lemonade out of the lemons we are given. We explore all models of negotiation—both more conventional conceptions and a large body of new work—in theory, practice, empirical study and evaluation, and ethics.

We want you to learn that negotiation is both an analytic “science” of considering what issues are at stake, who the parties are, and what solutions are legally and creatively possible, and a human “art” in the sense that actually doing negotiations involves talking with and doing things with other people. You need conceptual, behavioral, and affective competencies to become a good negotiator. We explore the necessary analytic frameworks, the skills you need to master negotiation, ethical issues implicating how you use your skills on behalf of and with others, and finally, some of the different contexts in which negotiation is used. Because legal negotiators are working with clients, as agents, we also provide some guidance about how you can negotiate for others by interviewing, advising, coaching, and otherwise counseling your clients about how they can achieve good outcomes with well-considered processes.

In this first chapter we introduce you to some of the foundational concepts of conflict theory (both constructive and competitive) and negotiation (problem solving for joint gain or individual gain maximization). We introduce you to different models of negotiation and some descriptions of the typical stages most negotiations go through. We hope you will see that there is no one “mind-set” or orientation to all negotiations. Each negotiation must be separately conceptualized:

1. What is at stake?
2. What are the parties trying to achieve?
3. What is the relationship of the parties to each other?
4. What legal constraints are the parties operating under?
5. What behaviors might most effectively be employed to accomplish the goals of the negotiation?
6. How does this single negotiation affect other people or other situations?
7. How can we know we have had a successful negotiation?

A. CONFLICT THEORY

Although law school focuses on disputes or cases, the disputes that make it into casebooks represent the tip of the iceberg of all the kinds of conflicts that people have. Lawyers are often called on not only to bring or defend lawsuits, but also to help prevent conflicts from arising or to deal with disputes other than in court. Thus, it is useful for lawyers to have a broad understanding of the types of conflicts that may exist. Scholars in a wide variety of the social sciences have attempted to define and develop taxonomies of different kinds of conflicts so as to better understand the different possible treatments or interventions available in conflict settings. At the same time, it is important to realize that not all conflict is bad or should be avoided. Social psychologists and sociologists such as Morton Deutsch, Georg Simmel, and Lewis Coser remind us to think about conflicts that are constructive as well as destructive. In the next two excerpts, Carrie Menkel-Meadow briefly explores these multiple aspects of conflict and introduces the history and conceptualization of the field of dispute resolution.



**Carrie Menkel-Meadow, ROOTS AND INSPIRATIONS:
A BRIEF HISTORY OF THE FOUNDATIONS OF
DISPUTE RESOLUTION**

in *The Handbook of Dispute Resolution* 13, 14-15 (Michael L. Moffitt & Robert C. Bordone eds., 2005)

**EARLY HISTORY: DESCRIPTIONS OF THE FIELD
AND FOUNDATIONAL THEORIES**

The social sciences now include a field called “conflict resolution,” whereas modern legal studies more often describe the field as “dispute resolution.” The different terms signal an important distinction between the two approaches.

Nineteenth-century founders of the field of sociology, including Emile Durkheim, Georg Simmel, and Karl Marx, looked at widespread social and political conflicts and sought to understand their origins, trajectories, and impacts on the larger society. Early on, tensions developed about whether conflict was beneficial for social change, whether it should be managed for social stability, or whether it was simply a normal part of human existence. These intellectual tensions remain with us today. Seen as a social phenomenon, conflict exists at many different levels—individual, familial, group, or nation-state. Indeed, as social psychologists have noted, conflict can also be intrapersonal or intrapsychic. Within a single human being one can find conflicts linked to diverging perceptions, values, attitudes, or behavioral choices.

In law and legal studies, the unit of analysis has been the dispute, or “case”—an activated conflict in which someone has experienced a wrong and “named it, blamed someone or [some] entity and claimed against them” in a formal way. This activation process often plays out in a binary or polarized format of plaintiff and defendant, or complainant and respondent. Seeing a dispute as a separate, self-contained unit of social interaction, requiring some form of formal or legal intervention, is different from seeing a dispute as located in a more socially enmeshed world of multiple parties, interconnected issues, and social and relational history.

Thus the very nomenclature or definition of the relevant unit of analysis tells us something about how a conflict or dispute might be handled, treated, or resolved. For the most part, social scientists have focused on the embeddedness of disputes in larger fields or patterns of conflict and social relations, while lawyers and other dispute resolution professionals have focused on the concrete nature of particular disputes, suggesting use of particular techniques for dispute settlement or other resolution.

Socio-legal scholars who are both lawyers and anthropologists have bridged these disciplines by studying disputes in a broader social context, looking at how cases are socially constructed, labeled, and enacted. Scholars and practitioners of the school of “legal realism” were similarly attracted to looking at how disputes were formed and dealt with in particular settings, and so created a “jurisprudence of dispute resolution” and its institutions.

Together, the insights of these different approaches to studying conflict resolution have given us some basic propositions about the field, what some call a canon