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DR Ethics Book Brings It All Together

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DR ethics book brings it all together

By Jonathan R. Cohen

***Dispute Resolution Ethics – A Comprehensive Guide*, eds. Bryant Garth and Phyllis Bernard. ABA Section of Dispute Resolution, 2002. 520 pages. Paperback. \$49.95 (\$39.95 for members of the Section of Dispute Resolution).**

“Central to the operation of any fair and efficient system of dispute resolution . . . is a system of ethical rules.” So writes John Feerick in the conclusion to the delightful new book, *Dispute Resolution Ethics: A Comprehensive Guide*, edited by Bryant Garth and Phyllis Bernard. In a traditional courtroom, the roles of the professionals (i.e., the lawyers and the judge) and the ethics rules undergirding them are well-defined. No one asks how the judge will be paid. No one asks what the lawyers are supposed to do. The basic structure of that litigation process and the adversarial ethics surrounding it have been established by rules and by history.

Yet over the past several decades our country has increasingly moved toward a “multi-door” vision, both of the courthouse and of dispute resolution generally. Mediation, arbitration, ombuds practice, and now online dispute resolution have grown greatly, as have neutral provider organizations. Our understanding of negotiation has also increased dramatically in this period, as has the prominence of “problem solving” in lawyering.

This shift in dispute resolution processes has produced a myriad of ethical questions.¹ Consider a few:

Mediation: Should a lawyer representing a client in a mediation adhere to the cooperative ideals of that process or is s/he bound by the adversarial ethics of zealous advocacy? When a lawyer and psychologist team up to provide a full

range of family mediation services or when a non-lawyer drafts a detailed, legalistic mediation agreement, have the boundaries of the unauthorized practice of law been crossed?

Arbitration: How do the ethical obligations of party-appointed “partisan arbitrators” compare with those of mutually selected arbitrators? Apart from occasional campaigning, judges are not involved in soliciting business. However, some arbitrators and mediators advertise to maintain their livelihoods. What are the limits to this practice?

Ombuds: To whom does an ombuds owe primary loyalty, the organization or the complainant? Does that change in the private versus public sectors?

Negotiation: Do lawyers who negotiate have an obligation to seek fair or just settlements?

Provider Organizations: What are the responsibilities of ADR provider organizations in assuring the quality of their neutrals? Do these responsibilities change in court-annexed programs?

Online Disputes: Should the ethical standards for online ADR providers be the same as for face-to-face providers, or do special issues (e.g., electronic confidentiality issues) merit different standards?

The functional changes in how we process disputes have produced many challenging ethical issues.

The past several years have also witnessed a flurry of proposed and enacted ethics code revisions. These implicate lawyers’ ethics, family mediation, provider organizations, ombuds practice, arbitration, and negotiation. Witness the “Ethics 2000” commission proposed revisions to the ABA *Model Rules of Professional Conduct*, the *Model Standards of Practice for Family and Divorce Mediation* (2000), the CPR-Georgetown Commission *Principles for ADR Provider Organizations* (2002), the ABA *Standards for the Establishment and Operation of Ombuds Offices* (2001), the ABA *Draft Code of Ethics for Arbitrators in Commercial Disputes* (2002), and the ABA *Ethical Guidelines*

for *Settlement Negotiations* (2002). How is one to stay abreast of all of these ethical changes?

A cavalier response is to look at the appendix of *Dispute Resolution Ethics*, where many of the current ethics standards are reproduced. The more serious response is to read the book itself. It is the best book I know addressing the gamut of ADR ethics.

The book consists of 12 independent chapters, plus an introduction and conclusion. Seven of the chapters address mediation. Each of the other chapters is devoted to one of the following: negotiation, provider organizations, arbitration, ombuds, and online dispute resolution. The authors include some of the finest thinkers in the field from both practice and academia. The essays range stylistically: some attempt black-letter restatements of governing rules and ethics standards, some include “best practice” tips for avoiding or responding to ethical challenges, and some offer theoretical critiques of our existing ethical structures. The overall quality of these essays is extremely high.

Dispute resolution practice has changed dramatically over the past several decades. The traditional litigation model has increasingly given way to a “multi-door” vision of varied dispute resolution practices. With that functional change in how we process disputes has come a pressing need to address the varied ethical challenges of these varied practices. *Dispute Resolution Ethics* is a marvelous contribution toward that effort.

Endnote

¹ For powerful arguments that varied ethics standards must be established for varied dispute resolution processes, in particular that adversarial litigation ethics should not be carried by rote into ADR processes, see Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers’ Responsibilities*, 38 S. Tex. L. Rev. 407 (1997); Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-adversarial Approach to Problem Solving*, 28 FORDHAM URB. L. J. 935 (2001).

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Dealing with Conflict in Public Disputes

Carpenter, Susan L. and W.J.D. Kennedy. *Managing Public Disputes: A Practical Guide for Government, Business and Citizens' Groups.* San Francisco: Jossey-Bass, 2001. 296 pages. \$30.00 (paperback). ISBN 0-7879-5742-9.

This is a paperback edition of a well-known "classic" in the field, and includes a brief new introductory preface by the authors. Other than that, the book is the same as the 1988 version. It is divided into three general sections: an overview of what public disputes are and 10 principles of conflict management; a step-by-step process for dealing with such disputes (including

analysis, strategy design, developing options, educating parties, and the process of reaching agreements); and ensuring the success of conflict management (including guidelines for helping the process to work, handling the "human side," and negotiating differences in data and breaking deadlocks).

Susan Carpenter is a mediator and trainer and the founding director of the Program for Community Problem Solving in Washington. She was the associate director of ACCORD Associates in Boulder, Colo., for 10 years. W.J.D. Kennedy was executive director of ACCORD Associates for 14 years and has consulted with a wide variety of private and public organizations.

Landau, Sy, Barbara Landau, and Daryl Landau. *From Conflict to Creativity: How Resolving Workplace Disagreements Can Inspire Innovation and Productivity.* San Francisco: Jossey-Bass, 2001. 187 pages. \$24.95 (hardcover). ISBN 0-7879-5423-3.

In this book, three members of the Toronto-based Landau family show how on-the-job conflict can be used to unleash creativity and enhance productivity. Using numerous case examples from their dispute resolution experience, the Landaus outline a collaborative model for resolving workplace conflicts. Essential components of this model are: a collaborative process, skilled and motivated participants, a skilled leader who is comfortable with conflict, and a supportive organizational culture. The book's seven chapters include such titles as "Conflict: The Oxygen of Creativity," "Managing Organizational Conflict," and "Playing With Fire."

Sy Landau is a professional mediator and trainer and president of Organizational Strategies Group Inc., a management consulting firm. Barbara Landau, a psychologist, attorney, trainer and mediator, is president of Cooperative Solutions. Daryl Landau is a dispute resolution consultant and trainer with Organizational Strategies Group Inc.

Robert, Maryse. *Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals.* Toronto: University of Toronto Press, 2000. 298 pages. \$24.95 (paperback). ISBN 0-8020-8170-3.

Using detailed case studies of the four issues mentioned in the title of this book, Maryse Robert develops a theoretical framework to help explain the outcomes of trade negotiations in terms of structure and process. "Structure" is made up of the resources a state brings to the table in a given issue area; "process," in contrast, refers to the state's behavior as expressed by the tactics of its representatives in actual negotiation.

Among the questions the author considers are: What counts as winning and losing in a given issue area? What are a state's resources in a trade negotiation? Are all resources equally important? Is the utility of some tactics linked to certain resources?

Maryse Robert is a senior trade specialist in the Trade Unit of the Organization of American States, Washington.

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