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 forefront 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.

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 R.A. 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, Ayong 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 Raiffä, 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.
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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.

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