

To my other family,
the community of dispute resolution academics and practitioners
who have inspired and taught me*

* My other books have been dedicated to members of my immediate family.

Contents

Acknowledgements	ix
Copyright Permissions	xi
About the Author	xiii
Forewords	
<i>Cliff Hendler</i>	xv
<i>Jeremy Lack</i>	xvii
<i>Lela Love</i>	xix
1. Introduction and Overview of the Three Parts	1
PART ONE	
Mediation Representation	21
2. MEDIATION REPRESENTATION: Acknowledgements	23
3. Problem-Solving Advocacy in Mediations: A Model of Client Representation	33
4. MEDIATION REPRESENTATION: Table of Contents and Introductory Chapter	64
5. Are Legal Disputes Just about Money? Answers from Mediators on the Front Line	85
6. MEDIATION REPRESENTATION: Representing Clients Anywhere	102
PART TWO	
Intercultural and International Mediations	125
7A. International Dispute Resolution: Cross-Cultural Dimensions and Structuring Appropriate Processes (A)	127
7B. International Dispute Resolution: Cross-Cultural Dimensions and Structuring Appropriate Processes (B)	153

8. Protocols for International Arbitrators Who Dare to Settle Cases	196
9. Mining Mediation Rules for Representation Opportunities and Obstacles	216
10. Selecting Mediators and Representing Clients in Cross-Cultural Disputes	223
11. Criteria for Approving Programs to Qualify Mediators for IMI Inter-Cultural Certification	245
12. Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally	255
13. Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers	277
14. The New Singapore Mediation Convention: The Process and Key Choices	296
PART THREE	
Negotiations	323
15. Mediation Representation, 3rd Edition, Chapter 1, Negotiating in Mediations	325
16. Fashioning an Effective Negotiation Style: Choosing between Good Practices, Tactics and Tricks	410
17. Nelson Mandela as Negotiator: What Can We Learn from Him?	426
Index	481

Acknowledgements

I want to express my deep appreciation for the support of Touro College and its law school throughout my career at Touro that made this lifetime of scholarship (so far) possible. I want to give special thanks to Dr. Bernard Lander, the founding and visionary President of Touro College and University System, and his visionary successor Dr. Alan Kadish. I also want to thank the deans at the law school who were supportive during each of their tenures-Howard Glickstein, Larry Raful, Patricia Salkin, Harry Ballan, and our new dean, Elena Langan.

A book project like this one would not have gone forward without considerable encouragement, and for that I want to thank Simcha Fishbane and Michael Shmidman, Editors of Touro University Press. I also want to thank Academic Studies Press, and especially the professional staff that labored behind the scenes and did magnificent editorial and design work, including Production Editor Kira Nemirovsky, Production Editor Associate Daria Pokholkova, and Editorial Director Alessandra Anzani. Finally, I want to give my personal thanks to two superb Research Assistants who came to the rescue at the right time to help move this project forward and to closure, Touro Law Students Meaghan Caltabiano and Yasmine Dieudonne.

Hal Abramson
June 18, 2020

Copyright Permissions

I want to gratefully acknowledge the permissions by these publishers for permitting me to reprint in this book the following articles and book chapters that they originally published:

Chapter 2. *Acknowledgements*, *MEDIATION REPRESENTATION—ADVOCATING AS A PROBLEM-SOLVER* (Aspen 3rd Edition, 2013). Reproduced with the permission of CCH Incorporated from *Mediation Representation* (ISBN 9781454831075) by Harold I. Abramson © 2013.

Chapter 3. *Problem-Solving Advocacy in Mediations: A Model of Client Representation* 10 *Harv. Neg. L.R.* 103 (Sp. 2005).

Chapter 4. *Table of Contents and Introductory Chapter*, *MEDIATION REPRESENTATION—ADVOCATING AS A PROBLEM-SOLVER* (Aspen 3rd Edition, 2013). Reproduced with the permission of CCH Incorporated from *Mediation Representation* (ISBN 9781454831075) by Harold I. Abramson © 2013.

Chapter 5. *Are Legal Disputes Just About Money? Answers from Mediators on the Front Line*, with Birgit Sambeth Glasner, Bill Marsh, Bennet G. Picker, and Jerry Weiss, *Alternatives* 35 (9 October 2017).

Chapter 6. *Mediation Representation: Representing Clients Anywhere*, in *ADR in Business*, Volume II, Chapter 14 (Editor Arnold Ingen-Housz, Kluwer Law International, 2011).

Chapter 8. *Protocols for International Arbitrators Who Dare to Settle Cases*, 10 *Am. Rev. of Intl. Arb.* 1 (1999).

Chapter 9. *Mining Mediation Rules for Representation Opportunities and Obstacles*, 15 *Am. Rev. of Intl. Arb.* 103 (Sp. 2005) This article originally appeared in the *American Review of International Arbitration*. 15 *Am. Rev. of Intl. Arb.* 103 (Sp. 2005).

Chapter 10. *Selecting Mediators and Representing Clients in Cross-Cultural Disputes*, 7 *Cardozo J. of Confl. Resol.* 253 (2006).

Chapter 12. *Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally*, 49 *S. Tex. L.R.* 921 (2008).

Chapter 13. *Outward Bound to Other Cultures: Seven Guidelines for U.S. Dispute Resolution Trainers*, 9 *Pepperdine Dispute Resolution Law Journal* 437 (2009).

Chapter 14. *The New Singapore Mediation Convention: The Process and Key Choices*, *Sing. Ref. Bk.*, 20 *Cardozo J. Conflict Resol.* 1037 (2019).

Chapter 15. Ch. 1, *Negotiating in Mediations*, *MEDIATION REPRESENTATION—ADVOCATING AS A PROBLEM-SOLVER* (Aspen 3rd Edition, 2013). Reproduced with the permission of CCH Incorporated from *Mediation Representation* (ISBN 9781454831075) by Harold I. Abramson © 2013.

Chapter 16. *Fashioning an Effective Negotiation Style: Choosing Between Good Practices, Tactics and Tricks*, in *The Negotiator's Desk Reference* (Andrea K. Schneider and Christopher Honeyman, eds., DRI Press/Mitchell Hamline School of Law and NDR Books LLC, 2017).

Chapter 17. *Nelson Mandela as Negotiator—What Can We Learn from Him?*, 31 *Ohio State Journal of Dispute Resolution* 19 (2016).

About the Author

Professor Hal Abramson is a full-time faculty member at Touro Law Center, New York, where he has taught, trained, and written on negotiations, mediation, mediation advocacy, and resolving intercultural and international disputes for more than thirty years. For his contributions to the field of dispute resolution, he received the 2013 Peace Builder Award from the New York State Dispute Resolution Association.

He has taught or trained on dispute resolution in nineteen countries on six continents. While at Touro, he has visited full-time at other schools. He visited at Cardozo Law School in NYC and UNLV Law School in Las Vegas. He also visited for a year as a Distinguished Visiting Professor at the U.S. Air Force Academy where he assisted in building their negotiation program, including teaching negotiations and training negotiation teachers. He still is assisting the Air Force in different capacities on negotiation training and program design. He also serves on the adjunct faculty at La Trobe University Law School in Melbourne.

Abramson's numerous publications include the leading treatise on representing clients in mediation entitled *Mediation Representation: Advocating as a Problem Solver* (received the annual book award of the CPR Institute for Dispute Resolution). In addition, he co-authored the textbook *International Conflict Resolution: ADR Consensual Processes* (West). His article on "Nelson Mandela as Negotiator" received the CPR Institute for Dispute Resolution award for the best professional article of 2016.

For the International Academy of Mediators (IAM), he created a Scholar-in-Residence program in which academics contribute to the organization on a rotating basis. He also served as its first scholar and was given an award by IAM for his contributions and leadership. UNLV Law School in Las Vegas also selected him as one of its first two Saltman Senior Scholars in ADR.

Abramson served as Chair of the ABA Committee of the Section for Dispute Resolution that drafted the mediation representation rules for its national competition and received an ABA special service award for his work.

He also served as a member of the inaugural committee that launched the International Chamber of Commerce's global mediation competition in Paris.

He chaired an IMI (International Mediation Institute) task force that designed the first ever program for certifying intercultural mediators. He also chaired the Post-Summit Initiatives Committee for the ABA-UNCITRAL International Mediation Summit in Delhi.

Abramson participated in the three-year UN (UNCITRAL) drafting initiative that resulted in the new Singapore Mediation Convention to enforce cross-border mediated settlement agreements. He assisted IMI, IAM, and the U.S. State Department, participated in drafting sessions, and designed and moderated for UNCITRAL three mediation educational programs for the UN Delegates and public. He also co-chaired a symposium on the new Convention three months after the UN approved it. The symposium included presentations and written contributions by UN delegates that were published in a book entitled *Singapore Mediation Convention Reference Book* for use by countries contemplating adopting the convention and for parties using it.

After Hurricane Sandy, he assisted FEMA (Federal Emergency Management Agency) in designing a system for resolving disaster relief claims.

Abramson is an experienced domestic and international commercial mediator. He has been selected for the International Who's Who of Commercial Mediation since its inaugural year in 2011 and has mediated cases involving parties from more than a dozen countries. He also serves on the Association of American Law Schools' twenty-person panel that facilitates faculty retreats and has conducted strategic planning processes for law schools.

At Touro, he served for nine years as vice dean responsible for academic programs, faculty development, and international programs and was one of the first two faculty members inducted in the Law Center's Builders Society. He also has taught online courses and a range of business-related courses, including contracts, sales, business organizations, international business transactions, and anti-trust. He established the law school's first summer abroad program at Russia's premier university, Moscow State University, and he worked as an ABA CEELI (Rule of Law) Specialist in Russia on two law reform projects during Russia's early transition to democracy. In 2020, Professor Abramson received the Touro College Presidential Award for Scholarship.

Prior to joining the Touro faculty, he worked in private practice and state government for seven years, where he litigated contract disputes in a civil legal services office and then helped formulate business regulatory policies and litigated complex regulatory cases for a New York State agency.

For a full biography and list of publications, see Tourolaw.edu/faculty/abramson.

Forewords

Cliff Hendler

As an early pioneer in the field of commercial mediation, I have found Hal Abramson's research and writings valuable for informing and improving my mediation practice, now in its 30th year. In Abramson's newest book, *Beyond the Courtroom*, he brings together in a single source for practitioners like me many of his most illuminating publications over his more than thirty years of work in the field of dispute resolution.

I first met Hal in 2006 at the inaugural year of the International Chamber of Commerce Mediation Competition in Paris. He was a member of the committee that launched this global competition and helped design its rules. It was clear to me then, as it is for all of those who have interacted with him over the past decades: Hal is dedicated to identifying and promoting best practices that are not just theoretical. He focuses on practices that are realistic and practical for disputants, their advocates, and mediators, for preparing and participating in mediations.

Hal has taught students, advocates and mediators around the world. His seminal book, *Mediation Representation*, is used world-wide. I use the book as guidance for the advocates in my mediations and for insights into the hundreds of mediations I conduct annually.

Because of his thoughtful and enduring contributions to improving practice, I approached Hal in 2014 to design for the International Academy of Mediators (IAM) a program that would engage academics with the membership of this peer-selected organization of full-time mediators from around the world. He proposed various options to the IAM Board, and it ultimately adopted a Scholar in Residence Program (SIR) with rotational academic appointments. Hal served as the inaugural SIR for two years. The purpose of the program is to create a mutually beneficial dialogue between academics and practitioners. There is often a tension between theory and practice, and through this robust exchange the SIR program has been able to bring about understanding and growth between academics serving as SIRs and the membership of senior mediators who handle complex disputes.

Hal has had a profound impact on the establishment and growth of the ADR field and profession during his academic career. This new book, *Beyond the Courtroom*, compiles his top publications as a ready and useful reference for negotiators, advocates and mediators.

Cliff Hendler

Mediator

Founder and Past President of the International Academy of Mediators

Toronto, Ontario

January, 2020

Jeremy Lack

As a practitioner who has been involved in many international negotiations, mediations and other dispute resolution processes as an advocate and neutral, I have benefited greatly from the publications and trainings of Hal Abramson, who is the consummate “pracademic.” He brings together a rare combination of highly regarded academic scholarship (as evidenced by his award-winning publications) and practical experience (as evidenced by having been selected every year since its inauguration by the *International Who’s Who of Commercial Mediation*).

As demonstrated in this book, Hal excels in taking complex processes, analyzing them, and distilling what he learns into practical insights and techniques that can be readily applied by students, scholars, or professionals, whether in Common Law or Civil Law jurisdictions.

I first met Hal in Paris in February 2007 at the second ICC International Commercial Mediation Competition. What initially struck me about Hal was his dedication to learning and education, as illustrated by his chance encounter with a two student team without a coach from the National Law School of India, Bangalore. After the team passed the first round without a coach, Hal offered to help them if they were interested. They welcomed his support, having self-funded the trip to come alone to Paris. It was impressive to see the working relationship that quickly developed between Hal and these students as they prepared for each of the subsequent rounds. They knew nothing about Hal’s background as a professor and practitioner, and he did not want these talented students to know and risk feeling they should be deferential to him. The team reached the finals and took the second place by a split vote. Their prizes included a copy of Hal’s book, *Mediation Representation*. It was only then that they learned who Hal was and the erudition that had accompanied his coaching.

As a partner to a Swiss law firm, I subsequently invited Hal to Zurich and Geneva to give trainings to seasoned lawyers and in-house counsel. Within one day, he taught us new practical skills in negotiation and mediation advocacy that will remain with us for the rest of our careers. What was particularly noteworthy was Hal’s ability to induce us to revisit our engrained patterns for resolving disputes and to open our minds to new ways for improving our skills. The trainings also involved a different approach to preparing for negotiations and mediations, which included formulating a representation plan and actively working with clients. His advice to “always keep your eye on the 3 i’s” (interests, impediments, and information) has proven to be a simple and memorable

encapsulation of three key ideas that has been extremely helpful to me on many occasions.

I subsequently convinced Hal to become actively involved in the International Mediation Institute (IMI) and to co-chair its new task force on cross-cultural mediation. I served as a member. The task force was set up to foster mediation as a global profession and to design standards for certifying cross-cultural mediators. Here too Hal's ability to approach a complex topic by breaking it into simple and useful concepts was invaluable, especially in formulating "Cultural Focus Areas" or "CFAs" as guides for possible interventions in multicultural mediations (see Chapter 11). Hal went on to advise IMI on several more projects, most recently on the drafting of the Singapore Mediation Convention, which opened for ratification in August 2019. His recent article and edited book on the challenges and choices made in drafting the Convention shed illuminating light on this important new treaty (see Chapter 14).

Finally, a key finding of the Global Pound Conference Series in 2016 (an international project in 22 countries on access to justice and how to improve the future of dispute resolution) illustrates once again how Hal is forward-thinking. He had already thought through and written about one of the most important saliences to emerge from that project—the growing interest in "mixed mode" processes for combining mediation, conciliation and arbitration to generate bespoke, cost-effective dispute resolution processes. Seventeen years earlier, Hal had published an article entitled *Protocols for International Arbitrators Who Dare to Settle Cases* (see Chapter 8). This article and the appendices on final offer arbitration and minitrial procedures in his *Mediation Representation* book were prescient. They are likely to continue to influence academics and practitioners for years to come.

This collection of publications highlights Hal's vocation and "superpower"—to translate his vast understanding of the ADR field into simple, elegant and easy-to-remember insights that can be used in practice and remain fresh for all levels of experience. This book enriches the professional lives not only of newcomers, but seasoned lawyers and practitioners as well. It is a welcome compendium for everyone interested in studying or practicing ADR.

Jeremy Lack
Attorney-at-Law & ADR Neutral
Geneva, Switzerland,
January, 2020

Lela Love

As an academic, I have been impressed with how Hal Abramson's academic work speaks to multiple worlds. His work reaches practitioners looking for foundational ideas and best practices in negotiations, mediation advocacy, and mediations, including those interested in navigating cultural differences in international negotiations and mediations.

To take one of his foci, representation in mediation, discussed in Part I of this book, his published work grew out of and then informed his practice as a law school professor, a trainer of lawyers and neutrals, and a widely popular speaker at conferences and professional organizations. While legal academics must face the fact that their written work—in textbooks and law journals—are not inherently popular beyond those who are assigned to read them in the classroom or those looking for additional footnotes, in the case of Hal Abramson, his fate has been different. He has combined his written work (the stuff of academia) with practice, speaking and training, which has given his published work a reach and impact that are not typical of many academics.

I have had the privilege of co-teaching with Hal for over ten years an intensive course on Representation in Mediation at Cardozo Law School. It was “intensive” because it involved 28 hours of teaching in one week. It was also intense. Hal became deeply involved—one could say obsessed—with the theories he was working on, and that quality of focus and passion was translated into his written work. In the case of Representation in Mediation, his text *Mediation Representation: Advocating as a Problem Solver* won the 2004 coveted CPR Award for best book and has survived into a 3d edition and into the minds and hearts of both law students and professionals taking continuing educational programs and attending conferences.

The development of the book, in turn, provided fuel for the development of national and international mediation representation competitions, especially for the American Bar Association and the International Chamber of Commerce. The book also fueled the creation of a whole other dimension in law school teaching—courses on Representation in Mediation to parallel the longstanding focus in law schools on Moot Court and Trial Advocacy. As the academic world shifts to serve new fields, the world of practice is also influenced—and vice versa.

His other works also have had a practical impact. Hal's work on cultural competence for mediators has impacted international standards. His work on negotiations have been used for teaching students and training practitioners

and most recently as a basis for building a negotiation program at the US Air Force Academy.

If this book is a compilation of Hal's top written contributions to date, then it is evident that he has influenced law schools and academia—while also influencing the real world of practitioners and organizations. He has made many meaningful contributions to the field of dispute resolution. I look forward to seeing the next chapter of his work.

Professor Lela P. Love
Cardozo School of Law
New York City
January, 2020

CHAPTER 1

Introduction and Overview of the Three Parts*

(summary of publications)

First a disclaimer. I did not want to write this book. This is what others do—they compile selections of their writings. I initially ignored the request and resisted it until I succumbed as a favor.

I now must admit that I learned much about myself and my career path preparing this manuscript. It turned into a personally rewarding period of self-reflection, although much of that learning is not suitable for this book, which I suspect will be a relief to others.

My publications, I discovered, can be naturally grouped under three subjects: mediation representation, intercultural and international mediation, and negotiations. Even though the book is so subdivided, the three parts are connected and interdependent, as will be highlighted in this introductory and overview chapter.

As any academic knows, our individual contributions to a field are part of a larger tapestry fashioned by many contributors. No one scholar can claim to dominate a field, and I surely do not in this book. We learn from each other while trying to add to the corpus. It is for these reasons that I acknowledge many of the contributors who helped shape my thinking (*see* Part I, Ch. 2). Because my journey was accompanied by so many fellow travelers, I have dedicated this book to them, my other family—my dispute resolution family that has provided me much personal and intellectual nourishment.

When I look back at my publications, *so far*, I noticed that they are connected by one thread: how disputing parties can effectively resolve their own disputes. Thus the book title. I now suspect that an arbitration case induced me to focus my writings on settlement. In a commercial arbitration case early in my academic career, I was serving as the sole arbitrator. When I met with the

* I want to thank my diligent Touro Law research assistant, Meaghan Caltabiano, for the thorough and timely work she did reviewing and formatting each chapter and the book.

two attorneys, I inquired facetiously whether they were able to resolve the legal dispute while waiting for me. The attorneys said they could have, but not their clients. When I asked whether they considered mediation, they welcomed the idea and agreed to convert the arbitration into a mediation. They settled on terms that were strikingly better for both parties than what arbitration could have offered. After that case, I found it confining to stay within an arbitrator's role. I kept spotting opportunities to uncover better results for the parties if I could only switch to mediate. That experience combined with other experiences as a mediator and facilitator inspired me to focus primarily on how parties can improve resolving their own disputes.

Nevertheless, I have written on adjudicatory processes where a third-party neutral resolves a dispute.¹ That work has helped inform my understanding of consensual processes. Comparative studies can help make differences salient and therefore improve our understanding of our primary subject.

In my writings, I also have tried to achieve one overarching professional goal—to produce publications useful to practitioners. I have viewed the opportunities afforded by my position as a tenured faculty member as a privilege. I have tried not to live in an ivory tower. I did not want to squander my career by publishing works that would be of interest to only a small group of specialists and family members whose interest may end after reading the dedication.

I tried to build bridges between the worlds of practice and theory that often operate on separate paths. I have striven to ground my work in practice while moving beyond simply describing. I have read plenty of valuable descriptions of custom and usage. I wanted my work to be *practically aspirational*, which means to me, informed by practice, practical to do, and reflective of improved practices based on theories and studies for achieving better and optimum settlements.

In an effort to learn how to link the two worlds, I have not resided safely in front of my computer, although I have spent much time there. I have devoted considerable time in the practice world, as an academic, in order to learn personally what was happening on the front line. I have conferred frequently with practitioners and have experienced and navigated practice realities as a neutral, consultant, administrator, and chair of professional committees. I also have

1 See Nolan-Haley et al., *International Conflict Resolution* (2005). For example, the chapter I drafted on multi-step ADR clauses for this co-authored book on *International Conflict Resolution* included provisions on arbitration. The arbitration comparison (the third step) helped to clarify the distinctive nature of the consensual-based processes of negotiation and mediation (the first two steps).

Конец ознакомительного фрагмента.

Приобрести книгу можно

в интернет-магазине

«Электронный универс»

e-Univers.ru