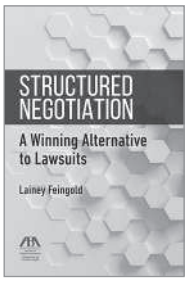
Books from the ABA Section of Dispute Resolution *Briefly Noted*

Prepared by Joseph B. (Josh) Stulberg



Structured Negotiation: A Winning Alternative to Lawsuits, by Lainey Feingold (ABA 2016)

Structured negotiation is a systematic framework for resolving legal claims. Its approach is predicated on the belief that by using an agreed-upon, repeatable structure for discussing and addressing legal claims, stakeholders can, without filing a lawsuit, equitably and cost-effectively resolve their concerns.

For more than 20 years, author Lainey Feingold and her colleagues have developed and used this process to secure more than 60 settlements of potential class-action cases on behalf of the blind community's legal claims for access to information and technology. How could a blind person, in the early 1990s, access her bank ATM machine without sharing confidential information with a friend or "helper" to get cash or check her balance? Answer: she couldn't. It became possible only after Feingold and her colleagues, collaborating with her clients and banks, used structured negotiation to develop an answer. Other success stories on behalf of persons without sight include mutually developing resolutions that brought " … talking prescription labels to the nation's pharmacies, tactile keypads to US retail, and accessible pedestrian signals to the streets of San Francisco."[1]

This text crystallizes the required process steps. It begins with the deliberate choice of the process title, "structured negotiation." Unlike collaborative law, structured negotiation does not require participating counsel and parties to sign a Participation Agreement that precludes those attorneys from representing their clients in subsequent litigation should negotiations not succeed.

Though litigation is always a backdrop possibility, structured negotiations occur with the plaintiff's commitment not to file a lawsuit as long as party negotiations are in progress. To enhance the probability of initiating and sustaining negotiations, participants systematically embrace a vocabulary, conduct, and commitment that support transforming potential adversaries into partners. The initial communication, carefully crafted, is an opening letter, not a demand letter. Participating advocates propose explicit ground rules for negotiation to stabilize communications and minimize gamesmanship; they conduct collaborative meetings to share information rather than pursue discovery or conduct depositions.

It is demanding for both the advocate and the client to remain committed to the process. Challenges abound: if one's negotiating counterpart does not provide a response within the agreed-upon time frame (e.g., 30 days), should you assume a negative response and declare the negotiations over? Be patient for a few days, thinking that the delay could be for understandable reasons, not just "negotiating gamesmanship?" Or pick up the phone or send an e-mail with an inquiry? How should you respond to a request to add new claims or parties to the conversation? What is the most desirable way to use the media to advance, not undermine, the negotiating goals?

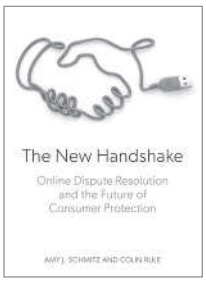
Referencing multiple examples from her personal practice, Feingold describes in detail an approach that, in her words, "… empowers advocates (clients), giving them a place at the table and a voice in the conversation….[E]ncourages corporate and government champions to do the right thing. And … offers lawyers a way to serve clients in a constructive, non-adversarial, more holistic manner."[2]

Stories Mediators Tell: World Edition (ed. Lela P. Love and Glen Parker) (ABA 2017)

In this volume, 25 people from outside the United States describe a particular effort they made to help others resolve a conflict and share their reflections on lessons they learned from that experience. Their accounts display common challenges, practices, and values among mediators across national and cultural boundaries and highlight how distinctive group norms and practices shape intervener strategies and conduct. Two examples are illustrative:

- Two parties, one a French speaker and one an English speaker, agree to mediate a case in France. The morning the mediation is to begin, the mediator learns in caucus conversations that the English speaker is demanding that the mediator conduct the session in English and says that if the mediator refuses, the English speaker will terminate the mediation. The mediator also learns that although the other party has brought along an interpreter, this French-speaking party does not agree that English should be the language for the mediation. After all, the Frenchman says, the mediation is taking place in Paris, so why not follow the adage "when in Rome, do as the Romans do?" Fluency in French, this party says, is one reason he selected this mediator. What should the mediator do? He began his opening statement as follows: "Hello. *Bonjour. Je suis* very happy *d'etre* à *Paris* and to receive you *dans* this beautiful *batiment* ...." This had the desired effect: namely, robust laughter from both parties and their quick agreement that the mediator would speak first in one language and then immediately repeat the same statements in the second language.[3]
- As a customary part of a mediator's effort to prepare parties and their advisors for a mediation process that would focus on the Aborigines' claims regarding the use of their ancestral lands, an appointed member of Australia's National Native Tribunal visited an Aborigines community. The mediator took a four-hour plane ride from Sydney, her home, to the rural airport, where she was met by her associate and the Aborigine claimants; she got into their flatbed truck and enjoyed viewing the countryside during the two-hour drive to the site. At the gate to the property, the mediator, being the youngest person on the truck bed and the nearest to the tail of the truck, jumped off the truck, opened the gate, let the truck drive through, closed the gate, and hopped back onto the truck. No one said a word. Shortly thereafter, the mediator's associate informed the mediator that the tribal elders were discussing whether to request a different mediator for their case. What had occurred? A serious misunderstanding of cultural norms. In white society, the mediator explained to the group, to allow an older person to jump off a truck and open a gate would be impolite and inconsiderate; the young person should just do it herself. Why was that offensive? A tribal woman noted: "You opened the gate to the only place on this earth that we can call our own. You are the guest here, and you behaved awfully like the host." With some more discussion of intentions, the misunderstanding was clarified, and the mediator continued her service.[4]

While Lela P. Love and Glen Parker, the book's coeditors, acknowledge that this book " … is missing some of the horrible stories that could be told about mediation …,[5]" they express the hope that " … with this volume, you [the reader] can take a break from the news and its stories of random or deliberate violence and their devastating impact and turn toward these stories of how mediators try to bring a happy ending to disputes that might otherwise end in violence as well."[6]



The New Handshake: Online Dispute Resolution and the Future of Consumer Protection, by Amy J. Schmitz and Colin Rule (ABA 2017)

Recall the "old" handshake: "…[M]erchants and consumers would meet in person to do business. They would discuss the terms, assess the trustworthiness and character of their contracting partners, and conclude the deal with a handshake. This handshake was more than a kind gesture….That handshake was one's bond — it was a personal trustmark."

Amy J. Schmitz and Colin Rule quickly and strongly note: "[T]hose days are gone."

Schmitz and Rule examine a targeted though extensive dimension of the consumer world: the millions of B2C (business-to-consumer) transactions that participants execute by interacting with each other not "face-to-face" but through digital technology. That is, consumer-merchant transactions are conducted in "e-commerce" in which texting, Skype, or e-mails constitute the communication networks for getting to a "handshake," networks in which national geographic or legal jurisdictions effectively pose no constraints to such transactions. This exciting, extraordinary commercial world carries remarkable challenges, including what if the participants to a commercial transaction do not fulfill their commitments?

For instance, what if the buyer pays the full price for the product via credit card, but the item is never delivered? Or is delivered four weeks after the promised date? Is damaged or does not work as advertised? From the merchant's perspective, what if the merchant is charged a system fee when the item was purchased (after the "bidding closed"), but the buyer thereafter refuses, for good or bad reason, to pay the seller the advertised price?[7]

What Schmitz and Rule establish is that participants, both consumers and merchants, all want the same thing: for every "customer issue" to be resolved satisfactorily as quickly and fairly as possible. Speediness, efficiency, easy procedures, safety, and consistent fairness are the consumer's top priorities. Businesses, in turn, gain loyalty and earn trustworthiness when their processes have all these attributes. Schmitz and Rule examine the lack of consumer remedies and customer care in B2C e-commerce, exploring why consumers rarely pursue remedies for purchase complaints and what would be required for them to use a dispute resolution process and feel fairly treated. They then analyze why any e-commerce business should invest in a well-designed resolution process; indicate how resolution data transparency benefits consumer protection authorities, consumer advocacy organizations, and policy makers; and explore the ethical standards required to sustain any problem-solving process. They conclude with a proposed design for a global e-commerce ODR initiative, indicating that their "initial proposal" is designed to trigger, not end, important discussion and ideas for this domain of extensive economic activity and effective problem-solving. ■

Endnotes

1 Lainey Feingold, Structured Negotiation: A Winning Alternative to Lawsuits 2 (2016).

2 *Id.* at 2.

3 Stories Mediators Tell: World Edition 8 (Lela Love & Glen Parker, eds., 2017).

4 *Id.* at 55.

5 *Id.* at xvi. The editors acknowledge, with appreciation, their professional colleagues who keep such stories alive and " … thereby make all of us better mediators."

6 *Id.* at xv.

7 eBay learned from such challenges that it colloquially referred to at the time as the "deadbeat bidder" process.