

2014

Skills and Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law, and Arbitration

Guy Bowe

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Guy Bowe, *Skills and Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law, and Arbitration*, 6 *Y.B. Arb. & Mediation* 467 (2014).

This Student Submission - Book and Literature Review is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

SKILLS & VALUES
ALTERNATIVE DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, COLLABORATIVE LAW
AND ARBITRATION

By
Guy Bowe*

I. INTRODUCTION

Skills & Values: Alternative Dispute Resolution: Negotiation, Mediation, Collaborative Law and Arbitration (“Skills & Values”) is authored by John Burwell Garvey and Charles B. Craver.¹ The authors wrote this book to introduce law students to the theoretical and practical skills needed to understand alternative dispute mechanisms.² The authors’ goal was to provide a useful, real-world learning environment so that students can understand different types of alternative dispute situations.³ To accomplish this goal, the authors developed exercises where students would assume different roles in an alternative dispute resolution (“ADR”) process tailored to specific factual scenarios. The exercises allow the students to apply the skills learned from the text, which explained the particular dispute mechanisms, while encouraging classroom discussion.⁴ Through completion of the exercises, students are able to reflect and refine their ADR skills in order to better serve their future clients.⁵

The book is a great tool for law school because of the various exercises, concise explanation of negotiation and mediation processes, and its reasonable price. Implementing this book in a classroom setting will provide maximum benefit because it will enable readers to practice the skills learned from the text.

II. OVERVIEW

Skills & Values is comprised of fifteen chapters and four parts. Part One discusses negotiation: the importance of negotiation skills, characteristics of effective negotiators,

* Guy Bowe is an Associate Editor of the Yearbook on Arbitration and Mediation and a 2015 Juris Doctor Candidate at the Pennsylvania Dickinson School of Law.

¹ JOHN BURWELL GARVEY & CHARLES B. CRAVER, ALTERNATIVE RESOLUTION: NEGOTIATION, MEDIATION, COLLABORATIVE LAW AND ARBITRATION (2013).

² John Burwell Garvey is a Professor of Law and Director at the University of New Hampshire School of law. He is nationally recognized for his work with the Webster Scholars. Charles Craver is a professor of law at George Washington University. He has taught negotiation skills to 90,000 lawyers throughout the United States.

³ GARVEY & CRAVER, *supra* note 1, at v.

⁴ *Id.*

⁵ *Id.* at vi.

the negotiation process, verbal/nonverbal communication, and ethical concerns.⁶ Part Two discusses mediation: why choose mediation instead of negotiation, selecting the mediator, mediator styles, tactical considerations, and ethical considerations.⁷ Part Three discusses collaborative law: the collaborative law process and the related advantages and disadvantages.⁸ Part Four discusses arbitration: basic characteristics, the Federal Arbitration Act (“FAA”),⁹ sources of arbitration, the arbitration process, benefits and limitations, and ethical considerations.¹⁰

The authors define alternative dispute resolution as an alternative mechanism to trial by judge or jury.¹¹ ADR was said to have started at the Pound Conference of 1976 when Professor Roscoe Pound presented a paper entitled “The Causes of Popular Dissatisfaction with the Administration of Justice.”¹² According to the authors, “ADR has gained acceptance in American law today to the point that it is no longer really considered ‘alternative’ but mainstream.”¹³ ADR programs now exist in most courts.¹⁴ Even when parties decide to litigate, courts regularly compel some form of ADR, usually mediation, prior to trial.¹⁵ In fact, many cases are regularly mediated even when mediation is not required.¹⁶ In most courts, fewer than five percent of civil and criminal matters are adjudicated.¹⁷ The authors believe that “ADR is everywhere. Whether you draft business agreements, real estate contracts, employment agreements, consumer

⁶ GARVEY & CRAVER, *supra* note 1, at 3-123.

⁷ *Id.* at 125-92.

⁸ *Id.* at 195-03.

⁹ Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2014).

¹⁰ GARVEY & CRAVER, *supra* note 1, at 204-62.

¹¹ *Id.* at 1.

¹² GARVEY & CRAVER, *supra* note 1, at 1; *see also* Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513 (discussing Dean Pound’s speech, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in more detail).

¹³ GARVEY & CRAVER, *supra* note 1, at 2.

¹⁴ *Id.*

¹⁵ *Id.* at 2; *see also* Richard M. Calkins, Esq., *Mediation: A Revolutionary Process that is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 1-4 (2013) (describing how mediation is an effective alternative to a litigation system that is too lengthy, too destructive, and too inefficient); *see also* Holly A. Streeter-Schaefer, *A Look at Court Mandated Civil Mediation*, 49 DRAKE L. REV. 367, 368 (2001) (describing how courts began mandating mediation in certain states regarding family law, medical malpractice, and civil litigation disputes).

¹⁶ GARVEY & CRAVER, *supra* note 1, at 2.

¹⁷ *Id.*

contracts or many other kinds of documents, dispute resolution procedures will be part of the equation.”¹⁸

III. PART ONE: NEGOTIATION

Part One introduces the ADR process of negotiation. At its simplest, the negotiation process is the means by which two or more individuals attempt to reach an agreement.¹⁹ Crafting good negotiation skills is important because “fewer than five percent of civil and criminal matters are adjudicated” – meaning that most cases settle.²⁰ Therefore, negotiation is an important skill for lawyers to master to achieve the best result for their clients.²¹

Traits that good negotiators possess include: good interpersonal skills,²² the willingness to prepare, the ability to employ tactics and certain counter tactics, knowledge of strengths and weaknesses of position, knowledge of client needs and interests as well as opponents, and an inner confidence.²³ The authors state that negotiators must fundamentally decide what the opposing side really wants and how much they are willing to give up to convince the other side to settle.²⁴ The authors challenge students to analyze their personalities and ask themselves questions related to how they handle disputes to alert students to certain patterns as they proceed through the negotiation exercises.²⁵

¹⁸ GARVEY & CRAVER, *supra* note 1, at 2.

¹⁹ See James B. Boskey, *Blueprint for Negotiations*, 48-DEC DISP. RESOL. J. 8, 8 (1993).

²⁰ GARVEY & CRAVER, *supra* note 1, at 5.

²¹ *Id.*

²² See Charles B. Craver, *The Impact of Student GPAS and a Pass/Fail Option on Clinical Negotiation Course Performance*, 15 OHIO ST. J. ON DISP. RESOL. 373 (2000) (discussing the lack of correlation between student GPAs and the results students achieve on negotiation exercises, because a student’s GPA reflects the student’s abstract reasoning skills, while negotiation reflects a student’s interpersonal skills).

²³ GARVEY & CRAVER, *supra* note 1, at 6-7 (the authors state the importance of effective negotiators recognizing each stage in the bargaining process in order to articulate a plan of what the negotiator wants to accomplish at each stage. Once negotiators understand the needs and interests of both parties involved in the transaction, the negotiator will begin to exude an inner confidence which will allow the negotiator to more effectively bargain for his or her client); see also Charles B. Craver, *What Makes A Great Legal Negotiator*, 56 LOY. L. REV. 337, 357 (2010) (discussing that “[s]tudent GPAs and emotional intelligence scores do not affect bargaining exercise outcomes nor does race or gender. Individuals who employ a Competitive/Problem-Solving style are more likely to obtain beneficial results than persons who behave in a Cooperative/Problem-Solving or Competitive/Adversarial style.”).

²⁴ GARVEY & CRAVER, *supra* note 1, at 9.

²⁵ *Id.* at 19.

In addition to the baseline traits listed above, negotiators tend to exhibit a particular style.²⁶ The authors categorize negotiator styles into two main categories: (1) cooperative problem solvers; and (2) adversarial negotiators.²⁷ Cooperative problem solvers try to create a comfortable negotiating environment to achieve a mutually beneficial agreement that will satisfy both parties.²⁸ On the other hand, adversarial negotiators want to obtain optimal results for their own side at all costs.²⁹ Adversarial negotiators tend to minimally disclose information and try to manipulate the other party.³⁰ The authors believe “the notion that one must be uncooperative, selfish, manipulative, and even abrasive to be successful is erroneous. To achieve beneficial negotiation results one must only possess the ability to say ‘no’ forcefully and credibly to convince opponents they must enhance their offers if agreements are to be achieved. This can be very effectively accomplished while being firm, fair and friendly.”³¹ Classroom studies completed by the authors prove three important points: (1) adversarial negotiators usually reach extreme agreements; (2) adversarial negotiators generate more non-settlements; and (3) cooperative problem solvers achieve more efficient combined results for both parties than adversarial negotiators.³²

Negotiation involves six stages: (1) preparation; (2) preliminary; (3) information; (4) distributive; (5) closing; and (6) cooperative.³³ The preparation stage is a fact gathering stage during which the client must disclose to the lawyer what he or she desires

²⁶ GARVEY & CRAVER, *supra* note 1, at 105; *see also* Melissa L. Nelken, *The Myth of the Gladiator and Law Students’ Negotiation Styles*, 7 CARDOZO J. CONFLICT RESOL. 1 (2005) (discussing whether law school students will conform to a stereotype of adversarial negotiation techniques rather than using a more cooperative style in a mediation setting); Charles B. Craver, *The Impact of Negotiator Styles on Bargaining Interaction*, 35 AM. J. TRIAL ADVOC. 1 (2011).

²⁷ GARVEY & CRAVER, *supra* note 1, at 105.

²⁸ *Id.*; *see also* Charles B. Craver, *It’s Effective and Somewhat Deceptive: The Competitive/Problem Solving Style*, 27 ALTERNATIVES TO HIGH COST LITIG. 161 (2009) (Discussing a hybrid style of negotiation: the Competitive/Problem-Solving approach. This style incorporates the optimal aspects of the cooperative and competitive styles); *see also* Charles B. Craver, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOTIATION L. REV. 143, 196 (2002) (Discussing that the myth of the effective hard bargainer should be destroyed because in the study completed adversarial negotiating was seen as increasingly ineffective); *see also* Alex J. Hurder, *The Lawyer Dilemma: To be or not to be a Problem-Solving Negotiator*, 14 CLINICAL L. REV. 253, 299 (2122) (Concluding that problem-solving negotiators better help find client solutions to problems).

²⁹ GARVEY & CRAVER, *supra* note 1, at 106.

³⁰ *Id.*

³¹ *Id.* at 107 (stating that a blended negotiators style is best because they seek competitive objectives (maximum client returns), but endeavor to accomplish their goals through problem-solving strategies).

³² *Id.* at 107-08.

³³ *Id.* at 19.

from the negotiation proceedings.³⁴ Lawyers will better understand their client's true definition of value if the client provides the lawyer with relevant information.³⁵ Lawyers must listen carefully and ask questions to uncover available alternatives to enhance the party's bargaining position when meeting with the opposing party because more options allow for more flexibility in the bargaining process.³⁶ The lawyer must then divide the client's goals into essential, important, and desirable categories.³⁷ Essential goals are items that are non-negotiable and must be obtained to have a successful agreement.³⁸ Important goals are items that the party wants to acquire but would exchange for an essential item.³⁹ Desirable goals are items that the party would like to acquire but would exchange for important or essential items.⁴⁰ Negotiators must assign respective point values to compare each item within their respective category to evaluate how well the negotiator performed their client.⁴¹

During the preliminary stage, "lawyers must familiarize themselves and develop legal theories to support their positions and anticipate counter arguments they expect the opposing side to make."⁴² The preliminary stage helps lawyers calculate their bottom line or Best Alternative to Negotiated Agreement ("BATNA").⁴³ BATNA is the point where it would be better not to enter into a negotiated agreement because alternatives are more attractive.⁴⁴ The preliminary stage requires a lawyer to evaluate the probability of a claim's success and the amount of the award if the parties could not negotiate a settlement.⁴⁵

³⁴ GARVEY & CRAVER, *supra* note 1, at 20.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ GARVEY & CRAVER, *supra* note 1, at 20.

⁴⁰ *Id.* at 20-21.

⁴¹ *Id.* at 21.

⁴² *Id.* at 22.

⁴³ *Id.*; see also Kim Taylor, *When BATNA Equals the Unthinkable: Business Mediations and Provocation*, 28 OHIO ST. J. ON DISP. RESOL. 549 (2013) (describing provocation and how negotiators should approach a situation when provocation arises); Noah G. Susskind, *Wiggle Room: Rethinking Reservation Values in Negotiation*, 26 OHIO ST. J. ON DISP. RESOL. 79, 116-17 (2011) (discussing that "wiggle room is about being persuasive and getting someone else to acquiesce while claiming more for yourself than would seem possible given the parties' self-determined reservation values").

⁴⁴ GARVEY & CRAVER, *supra* note 1, at 22.

⁴⁵ *Id.*

At the onset of a negotiation, it is important for a negotiator to have an elevated aspiration level which involves the negotiator setting high ambitious goals that are reasonably attainable.⁴⁶ Outlandish or unreasonable offers may discourage the opposing side from thinking a negotiated agreement is possible, diminishing the likelihood of a negotiated agreement.⁴⁷ Modest or reasonable offers may result in a phenomenon called “anchoring,” where people will reassess their own aspirational levels when they receive an offer better than expected.⁴⁸ Therefore, it is best to set ambitious goals that are reasonable, coupled with principled rationales that explain the negotiator’s position.⁴⁹ The opposing party will be less likely to dismiss a negotiator’s position if the negotiator supplies a logical rationale supporting his or her conclusions.⁵⁰

Once the negotiators are face-to-face, it is important to develop a positive non-threatening interaction with the opposing negotiator to create a less adversarial environment.⁵¹ The authors suggest discussing common interests to break the tension.⁵²

During the information exchange, the negotiator’s objective is to uncover the goals of the other party.⁵³ The authors suggest the best way to do this is by asking broad, open-ended questions to induce the opposing party to speak.⁵⁴ The opposing party is more likely to relay important information to the negotiator, such as how the opposing party values certain items.⁵⁵ Throughout the negotiating process, skilled negotiators listen to what the opposing party says and observe how the opposing party acts.⁵⁶ A skilled

⁴⁶ GARVEY & CRAVER, *supra* note 1, at 24; *see also* Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, (2002) (“[H]igh aspirations will help a negotiator achieve more-favorable bargaining results when a deal is reached, but at the cost of a higher risk of bargaining impasse and less overall satisfaction with bargaining outcomes.”).

⁴⁷ GARVEY & CRAVER, *supra* note 1, at 25.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 26.

⁵¹ *Id.* at 31 (stating that studies have found people who commence interactions in positive moods negotiate more cooperatively and are more likely to use problem solving efforts designed to maximize joint returns achieved by participants).

⁵² GARVEY & CRAVER, *supra* note 1, at 31-32 (The authors suggest that negotiators talk briefly about recent political events, sports, weather, mutual acquaintances, or other topics which may relieve the initial tension between the parties).

⁵³ *Id.* at 33.

⁵⁴ *Id.* at 34.

⁵⁵ *Id.* (stating that parties with higher preference should be willing to trade items of lesser value to obtain the items they want).

⁵⁶ *Id.*

negotiator tries to make opposing parties feel that they are being heard and respected. This will facilitate more discussions that could lead the opposing negotiator to disclose more information.⁵⁷ According to the authors, “active listeners not only hear what is being said but recognize what is not being discussed, since they understand that omitted topics may suggest weaknesses opponents do not wish to address.”⁵⁸ Above all else, the authors suggest to proceed through each stage slowly. The more knowledge a negotiator can obtain from the opposing party, the more effective the negotiator will be at negotiating a deal.⁵⁹

The authors suggest that lawyers utilize certain techniques employed by politicians to avoid disclosing certain information.⁶⁰ Some techniques the authors suggest include: (1) ignoring the question being asked; (2) answering part of the question; (3) answering the question by changing the scope of the question; and (4) answering by saying the information requested is privileged.⁶¹

During the distributive stage, negotiators begin discussing what they have and what they are willing to give up.⁶² Whoever makes the first offer has a distinct disadvantage for two reasons.⁶³ First, the side who receives the first offer has a better idea of the expectations of the other side and can react strategically according to what information he or she received.⁶⁴ Second, negotiators who make first concessions tend to be anxious and therefore generate a less favorable outcome for their client than the

⁵⁷ GARVEY & CRAVER, *supra* note 1, at 34.

⁵⁸ *Id.*

⁵⁹ *Id.* at 35.

⁶⁰ *Id.* at 38.

⁶¹ *Id.*

⁶² GARVEY & CRAVER, *supra* note 1, at 39; *see also* Charles B. Craver, *The Inherent tension Between Value Creation and Value Claiming During Bargaining Interactions*, 12 CARDOZO J. CONFLICT RESOL. 1 (2010) (discussing how bargaining styles can effect the settlement result based on the perception of value creation and value claiming).

⁶³ GARVEY & CRAVER, *supra* note 1, at 39; *see also* Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOTIATION L. REV. 1, 110 (2000) (Discussing that “one should not despair about the power dynamics, but should work aggressively to change them (including one’s own confidence level) if it appears that one brings a deficit of leverage to the table. We believe that power in negotiation can be used wisely and well, and that it can promote excellent collaborative agreements. But, as we have argued, power must be invoked carefully and wisely not only by those who are weak, but also by those who are strong”).

⁶⁴ GARVEY & CRAVER, *supra* note 1, at 39.

opposing side.⁶⁵ The authors suggest that the most skilled negotiators always find a way to receive the first offer even though sometimes it may be difficult.⁶⁶

Skilled negotiators must have a plan with regard to concessions or what they would be willing to give up.⁶⁷ The authors suggest that each concession should be smaller than the preceding one, and each should be made in response to an appropriate counter offer from the opponent.⁶⁸ The authors suggest abiding by these rules to demonstrate to the opposing party that the negotiator has control and patience.⁶⁹ When a negotiator establishes control and patience in a transaction, the opposing party will more likely respect the negotiator's position.⁷⁰ At a certain point, a negotiator should be willing to disclose alternatives to the opposing party.⁷¹ As always, the negotiator must remember the BATNA associated with the current scenario and be willing to walk away when negotiations have passed that point.⁷²

The closing and cooperative stages are the final two stages of the negotiation process.⁷³ In the closing stage, both sides are "psychologically committed" to a joint resolution.⁷⁴ The authors warn that a negotiator should not make a final concession they were unwilling to make previously just to finalize a deal.⁷⁵ The authors implore a negotiator to stay patient until all the details are finalized.⁷⁶ In the cooperative stage, negotiators focus on alternatives that may benefit both parties.⁷⁷ The goal is for both sides to cooperate to create win-win situations that were not previously discussed.⁷⁸ Ultimately,

⁶⁵ GARVEY & CRAVER, *supra note 1*, at 40.

⁶⁶ *Id.*

⁶⁷ *Id.* at 40.

⁶⁸ *Id.* at 40-41.

⁶⁹ *Id.*

⁷⁰ GARVEY & CRAVER, *supra note 1*, at 40-41.

⁷¹ *Id.* at 41.

⁷² *Id.* at 42.

⁷³ *Id.*

⁷⁴ *Id.* at 51.

⁷⁵ GARVEY & CRAVER, *supra note 1*, at 51.

⁷⁶ *Id.*

⁷⁷ *Id.* at 52.

⁷⁸ *Id.* at 55.

the parties must reach an agreement in writing so the agreement can be enforceable and binding.⁷⁹

Throughout the negotiation process, negotiators are bound by the Model Rules of Professional Conduct (“Model Rules”).⁸⁰ Rule 4.1 of the Model Rules states that “an attorney shall not knowingly make a false statement of material fact or law to a third party.”⁸¹ Comment 2 to Rule 4.1 specifically mentions that “different expectations are involved when lawyers are negotiating: Whether a particular statement should be regarded as one of fact can depend on the circumstances.”⁸² Under generally accepted negotiation conventions, certain types of statements ordinarily are not taken as statements of material fact.⁸³ The authors discuss that “Comment 2 not only permits attorneys to misrepresent their side’s settlement intentions, but also to misrepresent the way in which they subjectively value the items being exchanged.”⁸⁴ Negotiating lawyers do not have trouble complying with the Model Rules because items being exchanged in negotiation have subjective value, and therefore there is no need to comply with a truthfulness requirement.⁸⁵ Negotiators must tell the truth with regard to affirmative factual misrepresentations.⁸⁶ An affirmative factual misrepresentation is information that a person would rely on when making a decision that is not mere puffery or embellishment.⁸⁷

IV. PART TWO: MEDIATION

Part Two introduces the ADR process of mediation.⁸⁸ Mediation is classified as a type of negotiation that involves a neutral third party, called a mediator.⁸⁹ The mediator is trained to help the parties reach a voluntary resolution of their dispute and facilitates the

⁷⁹ GARVEY & CRAVER, *supra* note 1, at 55.

⁸⁰ *Id.* at 70; *see also* Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95 (2011).

⁸¹ GARVEY & CRAVER, *supra* note 1, at 70.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ GARVEY & CRAVER, *supra* note 1, at 70.

⁸⁷ *Id.* at 71.

⁸⁸ *Id.* at 127.

⁸⁹ *Id.*

negotiation process between the parties.⁹⁰ Mediation is a flexible ADR process that can be triggered by court, contract, or party choice.⁹¹ Many state and federal courts implement mandatory or voluntary mediation programs to encourage settlement of disputes to conserve judicial resources.⁹² The point in time which a mediation is held directly impacts how the mediation will proceed because the discovery process that occurred will affect what information is available to both parties.⁹³ Mediation is viewed as a favorable alternative to litigation because mediation is substantially cheaper, the emotional costs are much lower, and mediation allows parties to control their own fate instead of a judge or jury.⁹⁴ However, some lawyers feel mediation is a waste of time and money and fear their litigation strategy will be revealed through disclosures during the mediation process. Even though mediation is traditionally more expensive than negotiation, mediation is preferred to negotiation in some cases because a party can speak with a mediator instead of directly saying something potentially damaging to the opposing party.⁹⁵

Parties are free to choose a mediator for their mediation, but sometimes the parties are limited to selecting mediators from a preapproved list.⁹⁶ Skilled negotiators do their research to identify a mediator who has the “style and experience that will best suit their clients’ needs, based upon the facts and personality of the case.”⁹⁷ Through all phases of the negotiation process, skilled negotiators make strategic, calculated choices to improve their client’s position.⁹⁸ Novice negotiators are passive and accept the selection of a mediator instead of being heavily involved in the selection process.⁹⁹ To correct this problem, the authors suggest that negotiators need to ask the following questions when selecting a mediator: (1) Do they need to be competent in a certain area of expertise?; (2) Do they need to be practicing law?; and (3) Are there any conflicts of interest?¹⁰⁰

⁹⁰ GARVEY & CRAVER, *supra* note 1, at 127.

⁹¹ *Id.* at 130.

⁹² *Id.* at 127.

⁹³ *Id.* at 131.

⁹⁴ *Id.* at 128.

⁹⁵ GARVEY & CRAVER, *supra* note 1, at 129.

⁹⁶ *Id.* at 132.

⁹⁷ *Id.* at 133; *see also* Fred D. Butler, *The Question of Race, Gender & Culture in Mediator Selection*, 55-JAN DISP. RESOL. J. 36 (2001) (“[I]ndividual parties and their advocates bring this history of racism and sexism into the mediation process with them, whether it is a belief that they are powerful because of their status, race, sex, or culture, or powerless because of it.”).

⁹⁸ GARVEY & CRAVER, *supra* note 1, at 133.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 132.

Mediators are usually categorized to be facilitative,¹⁰¹ evaluative,¹⁰² or transformative.¹⁰³ Each type of mediator has a unique style and method for conducting a mediation process.¹⁰⁴ As a result, each mediator has a different approach to caucusing.¹⁰⁵ Caucusing occurs when disputants retreat to a more private setting to process information, agree on negotiation strategy, and confer privately with counsel and/or the mediator.¹⁰⁶ During private caucus sessions, the mediator talks to each party individually.¹⁰⁷ Facilitative mediators resort to caucus sessions only when face-to-face talks are not progressing well.¹⁰⁸ Alternatively, directive mediators prefer to start with caucus sessions to confidentially determine what each side wants to achieve.¹⁰⁹

¹⁰¹ GARVEY & CRAVER, *supra note 1*, at 134 (Facilitative mediators “try to reopen blocked communication channels and generate direct inter-party discussions that will enable the parties to formulate their own agreements. They view impasses as the result of communication breakdowns and/ or unrealistic party expectations. They work to induce advocates to reconsider the reasonableness of their respective positions. They prefer joint sessions during which they try to induce the parties to engage in more open face-to-face discussions. They resort to separate caucus sessions only when they conclude that face-to-face talks are not progressing well”).

¹⁰² *Id.* at 134-135 (“Evaluative mediators tend to tend to focus more on the substantive terms involved. They try to determine what terms would be acceptable to the parties and convince the parties to accept those terms. These neutrals are used to interacting with inexperienced negotiators who have difficulty reaching their own agreements. These neutrals tend to feel a need to control the bargaining interactions they encounter”).

¹⁰³ *Id.* at 135 (Transformative mediators “are described as the innovative mediator style category. They work to demonstrate to participants that they possess power over their final outcomes and to generate mutual respect between the parties that will enhance their ability to solve their own problems. By using this approach to empower parties, they hope to induce those individuals to explore the underlying issues and look for mutually beneficial agreements. They also wish to teach negotiators how to use their abilities to resolve future controversies”); see also E. Patrick McDermott & Ruth Obar, *What’s Going On in Mediation: An Empirical Analysis of the Influence of a Mediator’s Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 109 (2004) (Discussing that evaluative mediation is preferred over facilitative mediation for a charging party or plaintiff who is represented. However, if one does not want to use an attorney, facilitative mediation is clearly preferable. For an employer in employment mediation, the best scenario is an evaluative mediation without representation on either side).

¹⁰⁴ GARVEY & CRAVER, *supra note 1*, at 133.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ GARVEY & CRAVER, *supra note 1*, at 134; see also Richard M. Calkins, *Caucus Mediation – Putting Conciliation Back into the Process: The Peacemaking Approach to Resolution, Peace, and Healing*, 54 DRAKE L. REV. 259 (2006) (describing how caucus mediation is the most conducive to conciliation and peacemaking).

Many mediations require confidentiality and the actual clients to be present at all mediation sessions.¹¹⁰ Mediators usually conduct sessions at neutral locations that are suitable to all of the parties involved in the mediation.¹¹¹ At the beginning of a mediation, the mediators indicate that any information shared by a party will not be disclosed to the other party by the mediator without the party's consent.¹¹² Mediators also stress the benefits of mediation as a "forward looking" mechanism, which focuses on the present and future implications of a dispute, as opposed to litigation, which focuses on the past.¹¹³

Throughout the mediation process, the parties have to keep track of the negotiation proceeding as it relates to the client, mediator, and the opponent.¹¹⁴ The authors analogize this process to playing "three dimensional tic-tac-toe" because of how complicated it can be to keep track of each party's position.¹¹⁵ The parties are trying to convince the mediator of the "strength and sincerity of their position" so that the mediator will work their hardest to achieve the best possible outcome for their side.¹¹⁶ Skillful mediators always remind each party of the benefits of controlling the outcome of the dispute rather than risking the uncertainty of a judge or jury deciding the outcome.¹¹⁷ The mediator effectively conveys the benefits of mediation compared to litigation by asking the parties the following questions: (1) What are the weak points of their case?; (2) How effective will their representation be in making their case?; (3) How will a jury will react to their case?; (4) What the trial will cost?; and (5) What is the probability of a favorable result at trial?¹¹⁸ If mediation is successful, parties will reduce their agreement to writing and avoid judicial adjudication of the dispute.¹¹⁹

Ethical requirements of mediation are listed in the Model Standards of Conduct of Mediators, which were created in 1994 by the American Arbitration Association, the American Bar Association's Section of Dispute Resolution, and the Society of

¹¹⁰ GARVEY & CRAVER, *supra* note 1, at 136.

¹¹¹ *Id.*

¹¹² *Id.* at 139.

¹¹³ *Id.*

¹¹⁴ *Id.* at 140.

¹¹⁵ GARVEY & CRAVER, *supra* note 1, at 140.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 141.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Professionals of Dispute Resolution.¹²⁰ If the parties did not adopt mediation rules of these organizations, then the parties can draft an agreement which will set out the rules of mediation.¹²¹ Lawyers who advocate for a party during mediation must follow the Model Rules. Rule 1.4 requires a lawyer to “reasonably consult with [his or her] client about means by which the client’s objectives are to be accomplished.”¹²² Rule 1.4 implies that lawyers should mention ADR mechanisms to their clients.¹²³ Although Rule 1.4 does not specifically mention ADR, the authors believe it would be prudent for a lawyer to mention this alternative to his or her clients.¹²⁴ At the beginning of mediation, mediators¹²⁵ need to be mindful of disclosing potential conflicts of interest to the parties involved in the mediation. Model Rule 1.12(a) requires written consent from the parties if there is a potential conflict of interest, but some states do not allow a mediation to proceed even if there is consent by the parties.¹²⁶

V. PART THREE: COLLABORATIVE LAW

Part Three introduces a relatively new form of ADR called collaborative law. Collaborative law involves the lawyers and clients who commit to resolving their dispute through cooperative strategies without the help of a mediator or third party.¹²⁷ Negotiation in a collaborative law environment is much different from standard negotiations because “lawyers attempt to ascertain all of the true interests and needs of the parties and find solutions to meet as many needs as possible.”¹²⁸ Collaborative law is a process designed to build trust and transparency between the parties, and it is an effective ADR procedure for parties who wish to maintain amicable business relationships.¹²⁹ The unique aspect of collaborative law is that if the parties are unable to agree to a resolution of their dispute, the lawyers involved in collaborative law will not represent their respective clients through any form of litigation or other court-like

¹²⁰ GARVEY & CRAVER, *supra note 1*, at 146.

¹²¹ *Id.* at 146-147.

¹²² *Id.* at 147.

¹²³ *Id.* at 147.

¹²⁴ *Id.* at 147-148.

¹²⁵ See Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, 14 ALTERNATIVES TO HIGH COST LITIG. 57 (1996).

¹²⁶ GARVEY & CRAVER, *supra note 1*, at 148.

¹²⁷ *Id.* at 195.

¹²⁸ *Id.* at 197.

¹²⁹ *Id.*

proceeding.¹³⁰ Therefore, parties most likely do not retain their in-house counsel to handle a collaborative law meeting because the in-house counsel would be barred from representing their client in subsequent litigation.¹³¹ The Uniform Law Commission drafted a Uniform Collaborative Law Rules Act that has since been accepted by several states.¹³² The authors discuss that “more than 22,000 lawyers have been trained in collaborative law worldwide and more than 1,250 lawyers have completed their training in England and Wales, where collaborative law was launched in 2003.”¹³³

Most lawyers believe that collaborative law is an ineffective, or soft, process because of the belief that there only can be “winners” and “losers” when a conflict arises.¹³⁴ However, trained collaborative lawyers believe in this process because they believe focusing on the needs and interests of the parties will create a resolution to a dispute that will maximize both parties’ benefits while reducing costs.¹³⁵

The advantages of collaborative law make it an attractive ADR option.¹³⁶ Collaborative law is less adversarial, which benefits parties who wish to maintain ongoing relationships.¹³⁷ The collaborative environment encourages lawyers to think of creative solutions which may better suit the needs of the parties.¹³⁸ Another benefit of a collaborative law agreement is that both parties remain committed to settling the dispute.¹³⁹ In addition, the confidentiality of collaborative law proceedings is another benefit.¹⁴⁰ A Collaborative Law Participation Agreement, signed by the parties at the beginning of the process, provides that the parties agree to maintain the confidentiality of any oral or written communications made by the parties or their lawyers or other

¹³⁰ GARVEY & CRAVER, *supra note 1*, at 197.

¹³¹ *Id.*

¹³² *Id.* at 196.

¹³³ *Per the International Academy of Collaborative Professionals*, COLLABORATIVE LAW WORLDWIDE, (Dec. 31 2011). <http://collaborativepractice.com>.

¹³⁴ GARVEY & CRAVER, *supra note 1*, at 200; *see also* Dafna Lavi, *Can the Leopard Change his Spots?! Reflections on the Collaborative Law Revolution and Collaborative Advocacy*, 13 CARDOZO J. CONFLICT RESOL. 61, (2011) (Discussing whether lawyers can function in a collaborative law setting due to their inherent instincts to be adversarial).

¹³⁵ GARVEY & CRAVER, *supra note 1*, at 200.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *See Confidentiality*, ABOUT COLLABORATIVE LAW (Feb. 13 2014) http://www.dallascollaborativelaw.com/aboutcl_confidentiality.php.

participants in the collaborative law process, whether before or after a lawsuit is formally filed.¹⁴¹ Texas law provides that “a communication related to the subject matter of the dispute made by a participant in the collaborative law process is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial proceeding.”¹⁴²

Collaborative law has some drawbacks for disputes that are too adversarial in nature.¹⁴³ Some parties are unable to work in a collaborative law environment due to the emotion attached to their claim. If lawyers are not properly suited for a collaborative law environment then a collaborative law process would be emotionally tolling as well as a waste of time and money.¹⁴⁴ Also, some parties do not have the funds necessary to pay for collaborative negotiation as well as litigation counsel if collaborative negotiations fail.

Collaborative law has become a more popular form of ADR utilized in divorce proceedings.¹⁴⁵ A study completed by David Hoffman, an attorney and mediator at Boston Law Collaborative Group, reported the average cost of a divorce to be \$6,000 to \$7,000 for mediation; \$19,000 to 20,000 for collaborative law; \$35,000 for traditional attorney to attorney negotiation; and a minimum of \$20,000 to \$50,000 for trial.¹⁴⁶ However, the authors of *Skills & Values* suggest that “while collaborative law is normally less expensive than traditional litigation, it typically involves the use of multiple professionals in addition to attorneys for both parties, including a divorce coach, a child development/parenting specialist, and an accountant.”¹⁴⁷ The result is that this route typically costs three times as much as a mediated divorce.”¹⁴⁸

Under a collaborative law agreement, a four way contract between two clients and two law firms that provides for mandatory withdrawal of counsel if a settlement is not agreed to between the parties has been viewed as “not inherently inconsistent with the Model Rules.”¹⁴⁹ Colorado is the only state that has not approved this type of agreement because Colorado viewed the contract as a non-waivable conflict of interest.¹⁵⁰ The ABA

¹⁴¹ GARVEY & CRAVER, *supra* note 1, at 200.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ David Hoffman, *Divorce Mediation*, MEDIATION MATTERS (Feb. 13. 2014), *available at* http://www.mediationmatters.com/the_cost_of_divorce.php.

¹⁴⁶ GARVEY & CRAVER, *supra* note 1, at 200.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 199.

has since issued an opinion that directly rejects Colorado's stance on the issue.¹⁵¹ The opinion explains that the four-way agreement was permissible under Model Rule 1.2(c), where a lawyer can limit the scope of the representation with the client if the limitation is reasonable under the circumstances and the client gives informed consent.¹⁵²

VI. PART FOUR: ARBITRATION

Part Four introduces the ADR process of arbitration.¹⁵³ In an arbitration proceeding, each party presents evidence and legal arguments to the arbitrator, or a panel of arbitrators, who resolves the dispute by rendering an award.¹⁵⁴ Arbitration is meant to be a streamlined,¹⁵⁵ court-like process that brings a sense of finality to disputes.¹⁵⁶ Parties have the ability to choose an arbitrator, or a panel of arbitrators, who have specific subject matter expertise.¹⁵⁷ Many people would rather have a complex dispute resolved by someone with subject matter expertise than a judge who most likely knows little about a specialized field.¹⁵⁸ Another basic characteristic of arbitration is that most proceedings are private.¹⁵⁹ Parties have the ability to apply administrative rules to an arbitration proceeding such as the AAA rules or put the rules of arbitration directly into the arbitration agreement.¹⁶⁰ Arbitration proceedings are generally shorter than a trial because no jury is involved and the discovery process is generally limited.¹⁶¹ The authors

¹⁵¹ GARVEY & CRAVER, *supra* note 1, at 199.

¹⁵² *Id.*

¹⁵³ *Id.* at 207.

¹⁵⁴ *Id.*

¹⁵⁵ GARVEY & CRAVER, *supra* note 1, at 208 (There is an inherent tension between rights' protection and getting a functional trial process. The more effective you are, the less efficient you are; the more efficient you are, the less legal protection is afforded. Inefficiency is what arbitration is meant to cure but comes with price, is client willing to pay that price?).

¹⁵⁶ *Id.* at 210.

¹⁵⁷ *Id.* at 208.

¹⁵⁸ *Id.*

¹⁵⁹ Garvey & Craver, *supra* note 1, at 208; *see also* Andrew Chow, Esq, *Is Judge Judy a Real Court?*, CELEBRITY JUSTICE BLOG ON FINDLAW (Jan. 26, 2014), http://blogs.findlaw.com/celebrity_justice/2012/01/is-judge-judy-a-real-court-top-3-secrets-of-tv-judge-shows.html (Discussing that *Judge Judy* & etc. shows are not private, but parties agree to arbitrate so long as show pays awards. It is considered arbitration regardless of third party paying award *Kabia v. Koch*).

¹⁶⁰ GARVEY & CRAVER, *supra* note 1, at 209.

¹⁶¹ *Id.*

state that arbitrators are not bound by substantive law, by quoting Justice Blackmun when he stated, “[A]rbitrators are not bound by precedent.”¹⁶² According to the authors, “[arbitrators] may rule based upon their perception of what is fair as determined by common practice in the industry without regard to what the actual law may be.”¹⁶³ Another characteristic of arbitration is that the grounds of appeal are immensely limited.¹⁶⁴ The grounds for an appeal involve fraud, corruption, bias, evident miscalculation, and evident material mistake.¹⁶⁵

The law that applies to arbitration agreements is the Federal Arbitration Act (FAA).¹⁶⁶ The FAA was enacted in 1925 to end judicial hostility toward arbitration agreements.¹⁶⁷ The FAA made arbitration agreements valid, irrevocable, and enforceable.¹⁶⁸ Since the FAA, “a great deal of law has developed regarding the enforceability of arbitration agreements.”¹⁶⁹ The Supreme Court has described the FAA as a broad, liberal policy favoring arbitration.¹⁷⁰ In addition, the Supreme Court declared that a fundamental principle of arbitration was a matter of freedom of contract.¹⁷¹

¹⁶² GARVEY & CRAVER, *supra* note 1, at 210.

¹⁶³ *Id.*

¹⁶⁴ GARVEY & CRAVER, *supra* note 1, at 210 (The authors discuss that there grounds to vacate an award includes: corruption, bribery, undue means, and evident partiality, Arbitrator misbehavior (prejudiced the rights of one or both of the arbitrating parties), excess of authority which includes an arbitrator ruling on matter not submitted by the parties or excess of authority is doing something the court does not what you want it to do. Arbitrators may rule based upon their perception of what is fair as determined by common practice in the industry without regard to what the actual law might be. Certainly, lawyer arbitrators are generally concerned with applicable law, but most arbitrators attempt to reach a fair result as they perceive it).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* (2013).

¹⁶⁸ Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2014).

¹⁶⁹ GARVEY & CRAVER, *supra* note 1, at 211; *see also Allied-Bruce Terminix Cos., Inc., v. Dobson*, 115 S.Ct. 834 (1995) (Terminix and franchisee objected to assertion of jurisdiction by state court on basis of arbitral clause and § 2. The Supreme Court emphasized hospitable federal court inquiry into arbitration, and that the FAA meant to purge judiciary of its bias against arbitration. FAA protection applied whenever federal law reached, and in particular, federal courts must apply FAA even when exercising diversity jurisdiction over state litigation. State courts must also apply FAA whenever basis for applying federal law is found. Court reasserted that federalization policy pre-empts state law and state courts cannot apply state statutes that invalidate arbitration agreements. In her dissent Justice O’Connor stated that the FAA is “an edifice of the Court’s own creation” and majority “has strayed far afield.”)

¹⁷⁰ GARVEY & CRAVER, *supra* note 1, at 211.

¹⁷¹ *Id.*; The freedom of contract principle in arbitration allows parties to write their own rules for their particular transaction. The law allows parties to customize the process to their needs, eliminating unsuitable rules and techniques, and providing procedural devices that achieve fairness, finality, and functionality; *see*

Once an arbitral clause exists, the arbitration process commences via written notice to the other party or the administrative agency, whichever is required by the arbitral clause.¹⁷² A pre-hearing conference is planned and usually held over the telephone with the arbitrators and the two parties.¹⁷³ At the pre-hearing conference, the parties discuss scheduling, discovery requests, and evidentiary issues.¹⁷⁴ Next, the arbitration hearing is held, where the parties present evidence and deliver opening and closing arguments to the arbitrator who sits as the judge and jury.¹⁷⁵ The rules of evidence are relaxed, and each party has flexibility in the way they present their case to the arbitrator.¹⁷⁶ Sometimes, the arbitrators determine the outcome of a case based upon document submissions of the parties.¹⁷⁷ Finally, the dispute is resolved after the arbitrator renders an award, which is usually short and lacks sufficient detail to prepare an appeal.¹⁷⁸ Types of disputes submitted to arbitration include commercial,¹⁷⁹ construction,¹⁸⁰ employment,¹⁸¹ and sports disputes.¹⁸²

also Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S.Ct. 1212 (1995) (The Court qualifies freedom of contract principle with objectives of federal policy favoring arbitration. Parties are free to establish modalities of arbitration so long as their dispositions support effective reference to arbitration. Freedom of contract is fully operative only if it results in submission of dispute to arbitration).

¹⁷² GARVEY & CRAVER, *supra note 1*, at 215.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 215.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ GARVEY & CRAVER, *supra note 1*, at 216

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 249 (In the absence of an arbitration agreement, it can be difficult to determine how to resolve a particular dispute. Arbitration provides a dispute resolution system that can solve these ambiguous questions via contract prior to when the dispute arises).

¹⁸⁰ *Id.* at 250 (Construction law is a specialized area of the law where people prefer to have subject matter expertise that arbitration provides in resolving disputes).

¹⁸¹ GARVEY & CRAVER, *supra note 1*, at 251. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (discussing that the Supreme Court found employment contracts are subject to the jurisdiction of the FAA except for the narrow exceptions in § 1 of the FAA). *See 14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (2009) (discussing that Supreme Court decided that age discrimination claim under ADEA was subject to arbitration based upon collective bargaining agreement)

¹⁸² *Id.* at 254 (Arbitration is a common method of dispute resolution called for in a collective bargaining agreement between the players and the owners).

VII. CONCLUSION

Skills & Values is a book that focuses on theory and practical application of skills needed to better understand and appreciate ADR. The book is intended for students in a classroom setting but could be helpful for lawyers looking for an initial introduction to the various ADR processes. The authors state specifically that the book is not intended to be a final authority on each ADR subject matter. This book achieves the authors' purpose by introducing students, in a survey fashion, to each area of ADR. Despite the length of the book, only 264 pages, the text contains useful information intended to help the reader understand each ADR field. Each section addresses a different ADR process by discussing the underlying theory, applicable rules of professional responsibility, and exercises to practice the learned skills. The exercises provide the most benefit to the reader because the book encourages a hands-on learning approach for the reader to fully understand each ADR process.

The authors did a masterful job explaining negotiation and the six stages of negotiation which include: (1) preparation; (2) preliminary; (3) information; (4) distributive; (5) closing; and (6) cooperative. Throughout the section, the authors provide extensive detail on how an effective negotiator should strategically approach each stage. Even an experienced negotiator would probably learn something new from reading this section. Therefore, I highly recommend this section to both experienced and novice negotiators.

The authors did an excellent job in the mediation section by defining meditation and describing the benefits of meditation. The authors focus on the advantages to mediation compared to negotiation, as well as different styles of mediators. Ultimately, the section was informative and provide the reader with a solid understanding of mediation.

The authors do a great job of explaining the new ADR technique called collaborative law. According to the authors, collaborative law is different from other ADR techniques because its main purpose is to bring both parties and their lawyers together in order to work collaboratively and creatively to produce a win-win situation for both parties involved. The authors recommend collaborative law in divorce proceedings but caution that it may be too expensive because the parties may have to obtain new attorneys for litigation if the parties are unable to agree to an amicable resolution under collaborative law. Overall, the section was informative and provided the reader with adequate information to evaluate whether collaborative law would be an effective ADR mechanism for a dispute.

The arbitration section is much more underwhelming than all the other sections. Arbitration has been crafted and changed through the case law of the Supreme Court of the United States; therefore, it makes no sense that the authors decided to cite a handful of cases in the arbitration section of the book. I do not think there can be a good survey of arbitration, but the authors do a decent job of describing how a generic arbitration proceeding would work. Although, students can benefit by learning what an arbitration proceeding might be like, it is arguably more important for a student to understand what an arbitral clause must contain (or not contain) to be enforceable. Therefore, I believe another book could provide more comprehensive coverage on arbitration.