Preface

My original title for this book was “Mastering ADR.” I liked that title because I thought it conveyed the message that alternative dispute resolution is an art to be mastered, not a body of rules to be learned. There are, of course, both court rules requiring ADR and arbitration statutes. But knowing the rules and the statutes alone will not enable you to use ADR successfully for your clients. That is why this book is neither a treatise on ADR, nor a compilation of statutory and case law, nor an attempt at a restatement. Rather, it is a window into the thinking of the most well-respected neutrals, a practical chat with some of the most successful practitioners, and my own suggestions for using the wisdom of these neutrals and practitioners to help your clients in a changing ADR environment.

When mastering any art, a novice first learns the basic skills of the form. I assume that most readers have a solid background in labor law, employment law, or both. Much of their practice, however, has been before courts or administrative bodies. Very few practitioners have lengthy experience with ADR, although their number is growing. The best way to master an art form is to observe the masters and learn from them how they do it. It would be nice if it were easily systematized, so you could just learn the “rules of ADR procedure” and successfully use different ADR processes. But there is no body of procedural rules, nor are there uniform practices. Rather, the most experienced and sought-after neutrals have a range of practices. By examining this range, you can learn how to select neutrals that meet your needs and the needs of your clients. By reading the observations of the most experienced practitioners, you can learn how to prepare your client and yourself to succeed in ADR.

Few would argue that mediation is an art. Sometimes it seems more like magic, when a “no-holds-barred” battle turns

into a concrete agreement that resolves the dispute. But there is no systematic theory that successfully explains when and why mediation works. Mathematical game theory gives some insights, as does heuristics, a field in economics whose founders recently won a Nobel Prize. Even if there were intellectually sound theories to explain how mediation works, however, that would not necessarily help the practitioner. You need to watch others do it, engage in mediation yourself, and learn what neutrals believe makes for a successful mediation. This book allows you to observe how the experts prepare themselves and their clients for mediation, and how they conduct themselves during the mediation. Neutrals tell you how they mediate, what they want from you and your client, and what pitfalls to avoid. No book, however, can give you the actual experience of mediating. You need to do that yourself and then come back to this book to help you master mediation. This book can help you prepare for your first mediation, but until you have participated in a few mediations you will not be able to use everything this book has to offer. When you combine your personal experience with the advice of experts, you will be on your way to mastering mediation.

It is less obvious that arbitration is an art, since arbitration—particularly employment arbitration—may look a great deal like a trial before a judge. Most practitioners reading this book are prepared to arbitrate an employment case before a retired judge, if she acts as if she were still in her courtroom. But an arbitration that mimics a court trial fails to gain the valuable advantages of arbitration for the client. Arbitration is uniquely flexible, so that you can craft an efficient, effective process that differs from court, but still preserves due process while saving the parties time and money compared with traditional litigation. Creating the process and using it successfully is an art. You can start by reading what neutrals do, and are prepared to do, in order to help you create an expeditious process. Experienced practitioners tell you how they try to shape the process, with the arbitrator and opposing counsel, to meet the promise of arbitration. They also tell you how to prepare yourself and your client for arbitration—explaining both the similarities and differences between arbitration and trial. In several essays, I offer suggestions to help you move both the other side and the arbitrator toward an effective process. It is worth mastering arbitration, because it is likely to be around for a long time.

Finally, this book may challenge some of your ideas about employment arbitration. New research demonstrates that employees achieve a higher percentage of their aggregate demand

in arbitration, as opposed to litigation. That difference has grown over the years. Similarly, the due process protections and cost shifting rules that are now a part of employment arbitration may make it an attractive alternative to trial lawyers. This book will help you use this alternative to your clients' advantage. Once you master arbitration, you can successfully represent employment clients, regardless of the forum.

While these comments are addressed primarily to practitioners, I hope that this book will be useful to neutrals, as well. New neutrals can learn much from the practitioners and senior neutrals who have contributed to this book. Experienced neutrals, although familiar with many of the ideas in this book, will find new techniques they can incorporate into their practice. Finally, I believe this book will be valuable to practitioners who both advocate and mediate, or who are transitioning from advocacy to ADR.

I know this book will provide you insights into ADR that will enhance your professional competence. But I hope that by learning from the most sought-after neutrals and practitioners, you will be able to truly master ADR. When you do, both you and your clients will be ready for legal practice in the 21st century.

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