

CURRENT LITERATURE IN ADR

By Sherman D. Fogel

Since 2001 Amy Lieberman has been skillfully and successfully mediating employment disputes, both locally and nationally. Using her experience as a lawyer and her education in psychology, she deals effectively with both the legal issues and the personal and emotional components of conflict. In her new book, *Mediation Success: Get It Out, Get It Over, and Get Back To Business*, Ms. Lieberman not only shares her secrets to the settlement of disputes through mediation, but provides a guide to conflict management and avoidance. She has brought her extensive firsthand experience in workplace conflict management and dispute resolution to life through numerous examples drawn from her own practice, and vividly demonstrates that often it is not just about the money.

A mediator's style is to a great extent a product of the mediator's own personality and comfort level with the many faces of conflict. Although it generally is not a good idea to just copy someone else's style, one can learn much by studying the methods of successful mediators and incorporating those aspects one is comfortable with. In *Mediation Success* Ms. Lieberman reveals a characteristic of her style that may well explain why she is so in demand. She works with such warmth and concern, and so openly shares her own personal experiences with the parties, that she demonstrates a level of empathy and creates a rapport and trust many mediators never achieve. *Mediation Success* is written with that same warmth. Amy Lieberman is a past Chair of this Section, and if you know her, or have worked with her, as you read *Mediation Success* you will feel like you are actually hearing her talk to the parties.

In "Part One: War and Peace" Ms. Lieberman begins with a critical, but often overlooked, discussion of the goal of mediation. She observes that most people in conflict approach the process in a win-lose mindset. They come to the mediation thinking this is a battle and the goal is to win. She notes that a major source of anger and frustration is unmet expectations, and, if people approach the process expecting to win, their expectation is not likely to be met. Most disputes, whether in the workplace or otherwise, are not battles that need to be won, but simply problems that need a solution. So mediation should not be about winning; but about resolution.

This opening discussion is a part of, and leads to, the key theme of *Mediation Success*. For more than three decades since Roger Fisher and William Ury, published their seminal work on modern dispute resolution, *Getting to YES: Negotiating Agreement Without Giving In*, we have talked about mediation as focusing on the real interests of parties and seeking mutually beneficial outcomes, which has come to be referred to by the cliché "win-win." While a win-win paradigm is certainly more desirably than a win-lose framework,

it still leaves the parties thinking in terms of winning, with all the baggage that implies, rather than resolving. In *Mediation Success* Ms. Lieberman advocates what she calls the “can live with–can live with” model. She argues the goal of mediation is to find a resolution that all parties can live with and get on with their business and personal lives. While this “can live with–can live with” concept is not entirely new or ground breaking, the openness and effectiveness with which Ms. Lieberman explains it and uses it in her mediation practice may be a real revelation for many mediators, particularly attorney mediators used to relying on their legal analysis of probable litigation outcomes as their primary tool.

Ms. Lieberman explains that the *Mediation Success* process has four steps:

1. Get it Going
2. Get it Out
3. Get it Over
4. Resolve the Conflict

When lawyers and mediators talk of getting the mediation going, they often are thinking about mechanics like picking a mediator, agreeing on a date, and selecting a location. When Ms. Lieberman talks of getting it going, she means “setting the stage for success.” Ms. Lieberman makes a compelling case for the critical importance of the early joint session, and devotes almost thirty pages to an in depth discussion of it’s purposes, goals and benefits in setting the stage for everything that follows. Done properly, Ms. Lieberman would argue, the parties can often be moved from win–lose or even win–win expectations, to the idea of seeking “can live with” resolutions right from the start.

After the stage is set, she explores how to uncover the real interests of the parties in the “get it out” phase. During this stage and the next, she emphasizes and examines the importance to the parties of the personal and psychological components of the conflict, and proposes addressing them head on. She argues mediators must “go to the emotion, not away from it,” and should “*embrace* the emotion,” not ignore it or be afraid of it. In other words, as the subtitle of the book says, first “get it out,” and then help the parties “get it over.” Often this is a necessary prerequisite for the parties to be able to open themselves to resolution, particularly a resolution not characterized as a “win,” but a resolution they “can live with” and get back to their businesses and lives.

Scattered throughout *Mediation Success* are succinct catchy phrases and ideas, such as mediation “Myths” and “Realities,” and “Truths,” and “Success Rules.” For example, Ms. Lieberman’s twelve Mediation Success Rules are:

1. Go for the *Can Live With–Can Live With* outcome.
2. Make sure everyone is aware of the limitations of litigation.

3. Focus on the positive outcomes and opportunities that can come from conflict.
4. Language is key to setting the stage for success, so use words that reduce anxiety and build trust.
5. Being fully heard is essential to any mediation.
6. Word choice matters, so choose words that help bridge differences.
7. Revise expectations. Create optimism and encourage realism.
8. Get “no” three times before accepting a statement as a true indicator of position.
9. Invite each person to share their perspective.
10. Go to the emotion, not away from it.
11. Consider the symbolism of money.
12. A genuine apology will go a long way to bridge the gap caused by serious conflict.

After reading *Mediation Success*, just looking at a list of the Success Rules, or the Myths and Realities or the Truths, will remind the reader of the substance of the in depth discussion in the book.

Mediation Success: Get It Out, Get It Over, and Get Back To Business presents a holistic approach to conflict management and dispute resolution, dealing not only with legal positions and possible litigation outcomes, but with the underlying causes of conflict, the always present emotional components and the real interests of the parties. It is an approach that, when properly employed, not only resolves disputes, but leaves the participants in a better place. The *Mediation Success* approach is what mediation should be, but often is not. *Mediation Success* is a must read for everyone involved in workplace disputes, and the insights and recommendations are equally applicable to dispute resolution and conflict management outside the employment arena. The book is available on Amazon.com.

© 2012, Sherman D. Fogel. After 40 years as a trial lawyer, Sherman Fogel is now a full time mediator and arbitrator, and is a former Chair of the Alternative Dispute Resolution Section of the State Bar of Arizona. He frequently speaks on arbitration and mediation at programs sponsored by the American Arbitration Association, the American Bar Association and the State Bar of Arizona. He has been selected for inclusion in the 2008 - 2013 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. Mr. Fogel can be reached at 602-264-3330, mede8@msn.com or through www.shermanfogel.com.