

## CURRENT LITERATURE IN ADR

By Sherman D. Fogel

In our role as advocates, and in our service as mediators, we have all encountered disputes in which one party perceives the other as evil. In those situations, one must decide whether to bargain with the Devil. That decision almost always implicates the tension between the moral notion that negotiating with the Devil is just wrong, and the potential practical benefits of simply making a deal. Although there are people, including many dispute resolution practitioners and some political figures, who believe one should always be willing to try negotiation before doing battle, Robert Mnookin, in *Bargaining with the Devil: When to Negotiate, When to Fight*, suggests there are times when one should bargain even with a perceived Devil and other times when one should refuse. Mnookin offers a framework for analyzing the problem and making a wise choice when deciding whether to bargain with one perceived to be evil.

Robert Mnookin is Chair of the Steering Committee of the Program on Negotiation at Harvard Law School, and the Director of the Harvard Negotiation Research Project. Before Harvard, he was at Stanford Law School, where he co-founded and directed the Stanford Center on Conflict and Negotiation. He has mediated and arbitrated many complex commercial disputes and authored or edited numerous books and scholarly articles on various aspects of alternative dispute resolution.

Mnookin begins by distinguishing the two ways in which people see reality and make decisions: “intuitive reasoning,” involving emotions and feelings, and “analytical reasoning,” being deliberative and logical. He discusses how each, when used alone, can lead to poor decisions, particularly when parties are “locked in conflict with an enemy.” He suggests deciding whether to negotiate with a perceived evil enemy involves three challenges: (1) to avoid emotional traps that lead to knee-jerk decisions, (2) to conduct a costs/benefits analysis of the alternatives, and (3) to address the moral issues implicated in deciding whether to negotiate with such an enemy.

Mnookin explains how, particularly when making intuitive decisions, there are negative traps which often cause people to refuse to negotiate when they probably should, and positive traps that may lead people to negotiate when they probably should not. The traps are:

**Negative Traps  
Promoting Refusal**

Tribalism

Demonization

Dehumanization

Moralism/Self-righteousness

Zero-sum fallacy

Fight/Fight

Call to Battle

**Positive Traps  
Promoting Negotiation**

Universalism

Contextual rationalization and  
Forgiveness

Rehabilitation and redemption

Shared fault and responsibility

Win-win

Appeasement

Call for peace/Pacifism

After discussing the emotional traps, Mnookin describes how to do an analytical costs/benefits analysis focusing on the parties' interests, alternatives to negotiation, potential negotiated outcomes, costs of negotiation and reasonable prospects for implementation of a negotiated deal. He then confronts the notion that doing business with the Devil is simply wrong, and the role of morality in the decision making process, asking whether it is just another negative trap and noting:

This Faustian tension between pragmatism and principle is the heart of this book.

All of this takes Mnookin less than 40 pages, and sets the stage for what is not only the heart, but the soul, of this remarkable book. Mnookin discusses in depth eight real-life situations (four international conflicts, two business disputes, and two family contests) in which the adversary either really was evil, or, rightly or wrongly, was perceived to be evil. The eight cases, particularly the four international situations, are so compelling, that the reader quickly forgets this a book about dispute resolution and becomes completely caught up in the historical plots. These true stories reaffirm the cliché that fact is often more interesting than fiction.

Although a discussion of the eight real life cases is beyond the scope of this review, just a listing of them should excite you enough to read this book. Mnookin first discusses the imprisonment of Anatoli Sharansky by the Soviet Union on false treason charges and his refusal to negotiate with his captors

during his nine years in prison. Then he discusses the story of Rudolf Kastner, the Jewish leader in Nazi occupied Hungary who chose to bargain with Adolph Eichmann in an effort to save Jewish lives. Next he describes Winston Churchill's refusal to negotiate with Hitler in the face of considerable opposition by members of his own War Cabinet. The fourth international case is the decision of Nelson Mandela, who had been in prison for twenty-three years, to negotiate with the South African government in secret to try to end the apartheid regime. For each of these fascinating cases, Mnookin not only describes the historical facts and outcomes, but then engages in a critical analysis of the wisdom of the decision to bargain or not to bargain. He does the same for the two business disputes (software wars between IBM and Fujitsu and the labor/management disputes at the San Francisco Symphony) and the two family disputes (a horrible divorce and a destructive sibling dispute arising from a poorly thought out testamentary disposition of family real estate).

*Bargaining with the Devil: When to Negotiate, When to Fight* is a terrific book, and once you get to the eight real cases, you will not be able to put it down. From a practical perspective, it does what Mnookin promises – provides a useful framework for mediators, as well as the parties and their attorneys, to analyze and wisely decide whether to negotiate with the Devil or fight.

© 2011, Sherman D. Fogel. After 40 years as a trial lawyer, Sherman Fogel is now a full time mediator and arbitrator, and is a past 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 - 2012 lists of *The Best Lawyers in America* in Alternative Dispute Resolution. Mr. Fogel can be reached at 602-264-3330, [mede8@msn.com](mailto:mede8@msn.com) or through [www.shermanfogel.com](http://www.shermanfogel.com).