

CURRENT LITERATURE IN ADR

By Sherman D. Fogel

Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates by Dwight Golann is one of the most complete compilations of both philosophical mediation theory and practical “how to do it” tools and techniques to come along. Although the facilitation of communication is an important component, as Golann explains in his introduction, this is not your typical book about promoting communication and understanding in the hope of repairing relationships and finding creative solutions, but, rather, is about how to resolve serious legal disputes and end bitter and expensive litigation.

Dwight Golann is a successful ADR practitioner and a thoughtful academic. He was formerly a civil litigator, and is currently Professor of Law at Suffolk University, teaching mediation and negotiation. He has received numerous awards and honors for his work and scholarship in dispute resolution.

Golann has organized the book into four parts:

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| Part I | “An Overview of the Process: Advice for Novices” |
| Part II | “In the Process: Practical Strategies and More Complex Techniques” |
| Part III | “Representing Clients in Mediation; Advice for Lawyers” |
| Part IV | “Specialized Areas of Practice” |

Although Part I is intended primarily for the new mediator, it is a solid refresher course for the more seasoned practitioner. As Golann says, “Some experienced mediators find . . . the first two chapters provide a useful framework, helping them identify and organize the techniques they apply instinctively in their practices.” For the new mediator, Part I is a must. For the veteran, it is a quick read, and introduces Golann’s philosophical approach to mediation, putting the techniques discussed in Part II into a context.

Part II is the core of the book, which Golann says “describes cutting-edge techniques to resolve difficult cases” It begins with a straight forward discussion of the usual administrative and procedural pre-mediation matters, including some issues often critical to success, such as, party representatives with inadequate authority, identifying and getting the necessary stakeholders to the table, assuring everyone has adequate information to make settlement decisions, and such bargaining problems as the imposition of preconditions to mediating or retracting prior offers.

The heart of Part II is the six chapters exploring obstacles to settlement, impasse and closure. Golann neatly divides the material into process obstacles,

psychological roadblocks and merits barriers. Process obstacles differ, depending on whether the parties are engaged in positional bargaining or interest based negotiation. He explains the differences between the two; what kinds of disputes will involve positional bargaining and not be susceptible to interest based techniques; what the different barriers to settlement are in the two types of negotiations; and strategies for moving the parties to settlement in each type.

Psychological barriers involve emotions and cognitive forces. Commercial mediators tend to discount the importance of emotional issues, often to the point of pretending they don't exist. Golann correctly observes that people "swim in a 'sea of emotions'" and the "feelings are at least as important as facts in creating and sustaining conflict, and legal negotiations are often derailed because of them." He examines the identification of emotional barriers to settlement and explores strategies and techniques for dealing with them. He notes that cognitive forces "often distort bargaining decisions, for example, by leading disputants to suspect adversaries' motives and react negatively even to reasonable offers." He particularly identifies "reactive devaluation", "attraction to certainty and familiarity", "loss aversion" and "delayed loss reactions"; explains how to recognize them and appreciate their impact on the negotiating process; and, again, offers techniques to overcome their impact.

Merits obstacles to settlement include issues regarding "information exchange and analysis" and "evaluation and decision analysis". Golann explores the consequences of inadequate information and analysis and the ramifications of poor analysis and evaluation of litigation alternatives by the parties. He devotes a whole chapter to discussing the benefits and risks of mediator evaluation, and whether, when, to what extent and how the mediator might effectively use evaluation and analysis to help the parties to settlement.

Although the strategies and techniques for dealing with the obstacles to settlement are tools for preventing impasse, Golann includes tactics for resolving impasse when it does occur. He discusses how to manage closure when settlement is reached, and even includes some suggestions for appropriate mediator behavior when settlement does not occur. Finally, he wraps up Part II with a discussion of some ethical and legal issues, particularly matters of confidentiality, enforcement of participation in mediation and enforcement of mediation settlements.

Part III is for mediation advocates, and focuses on how an advocate can structure and control the process and use the mediator to further his clients' objectives. As Golann notes, "Wise lawyers understand how a mediator can help them. As one mediator remarked about a litigator, a note of admiration in his voice, 'She moved me around like a chess piece!'"

Part IV consists of five chapters, each written by contributing authors with special expertise, about mediation of employment disputes, insured claims and

other monetary dispute, intellectual property cases, environmental contamination disputes, and mega-disputes and class actions.

Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates is thoughtfully organized and well written. It also includes a DVD containing very well done demonstrations of many of the techniques discussed in the book. Although Golann brings his teaching to life through numerous examples drawn from his personal mediation practice, the book contains so much substance that I would not describe it as light reading. *Mediating Legal Disputes* is a book every mediator of serious legal controversies should read, and probably should own and re-read from time to time. If I were teaching a commercial mediation course, I would seriously consider it as the primary text, and if I were teaching mediation advocacy, I would probably make Part III required reading. The book is available from Book Publishing, ABA Publishing, American Bar Association.

© 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 - 2012 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.