

CURRENT LITERATURE IN ADR

By Sherman D. Fogel

The growing popularity of mediation is in no small measure a reaction against dispute resolution by litigation, in which a third party is given the power to determine the outcome and impose it upon the litigants. Mediation, at least as envisioned by its early proponents, is a process in which the disputants are the ones empowered to fashion their own solution to their own problem. The mediator is an impartial third party with no power who facilitates the negotiations, manages the process, and helps the parties reach a mutually acceptable resolution. As the mediator pool has been increasingly populated by lawyers and former judges, however, there has been a gradual move away from the traditional roots of mediation toward a judicial settlement conference model, in which the parties and their lawyers are encouraged to defer to the judgment of the mediator. While the settlement conference model may produce settlements in a substantial number of cases, it often does a disservice to the parties by denying them many of the real benefits of mediation. Gary Friedman and Jack Himmelstein, in their new book *Challenging Conflict: Mediation Through Understanding*, demonstrate how disputes can be successfully resolved without pressure, coercion or manipulation by the mediator, and how the parties can be given the opportunity to obtain the additional benefits inherent in the real promise of mediation.

For more than 25 years Gary Friedman and Jack Himmelstein have been training lawyers, judges and others in conflict resolution throughout the United States and abroad, through the Center for Mediation in Law, which they co-founded, and in cooperation with the Harvard Law School and the American Bar Association. Prior to their emersion in conflict resolution, Friedman was a trial lawyer in Connecticut, and Himmelstein was a lawyer with the NAACP Legal Defense and Education Fund. Himmelstein has taught clinical law at Columbia Law School and Friedman has taught mediation as an adjunct at Stanford Law School.

In discussing how they came to their approach to mediation, Friedman and Himmelstein noted that traditional conflict resolution “often came with deep wounding – psychological, emotional, financial,” and that there should be “the possibility of something good coming out of conflict.” They observed that when lawyers treat mediators like judges and looked to them “simply to broker a deal,” the mediator is more likely to resort to coercion and manipulation to pressure the parties into a compromise. They explain that they were searching for an approach that had integrity for both the mediator and the parties; would enable the parties to make voluntary decisions; and would insure that the parties were fully informed about everything, including the law but without being “dominated by the law (or the lawyers).”

Although Robert Mnookin, Williston Professor of Law and Chair of the Program on Negotiation at the Harvard Law School, in his preface describes *Challenging Conflict: Mediation Through Understanding* as a “path-breaking book” that sets forth a “radically innovative vision” of how mediation should be conducted, the book is, in a sense, a return to the roots of traditional mediation theory and practice. Friedman and Himmelstein expressly acknowledge that they were not trying to create something new, but were tapping into a natural desire of people in conflict to want to work together toward resolution. Whether their “understanding-based model” is a new approach or a variation on traditional mediation practice, it truly is a real alternative to the settlement conference model in vogue with so many lawyer-mediators.

Classical mediation theory dictates meeting with the parties in joint session before separating them and caucusing. Many lawyer-mediators today, however, immediately separate the parties, never giving them an opportunity for direct communication. In the understanding-based model, Friedman and Himmelstein not only return to the tradition of the joint session, but they do not caucus at all, conducting the entire mediation with all parties together in the same room. Although it is unlikely that many lawyer-mediators are going to abandon caucusing entirely, *Challenging Conflict: Mediation Through Understanding* presents a very compelling argument for the benefits of working together. It should be a must read for lawyer-mediators who do not incorporate working together in joint sessions as a part of their mediation process.

Friedman and Himmelstein base their approach on four core principles.

First, we rely heavily on the power of **understanding** rather than the power of coercion or persuasion to drive the process.

Second, the primary **responsibility** for whether and how the dispute is resolved needs to be with the parties.

Third, the parties are best served by **working together** and making decisions together.

Fourth, conflicts are best resolved by **uncovering what lies under** the level at which the parties experience the problem.

As *Mediation Through Understanding* suggests, the notion of “understanding” is central to the Friedman and Himmelstein approach, as it is in traditional mediation theory. They explain that parties in conflict are often locked in a standoff, attacking and counter attacking, which they call the “conflict trap.”

“The more they struggle with one another, the more the trap tightens its hold.” How they are dealing with each other stands in the way of finding what the solution might be. It is not necessary that the parties ever come to agree with each other, but it is important that they begin to understand each other’s perspective on the dispute.

When the parties truly understand each other’s perspective on the dispute; what their real interest (as distinguished from their legal positions) are; what the real interests (as distinguished from the legal positions) of the other party are; what the legal risks and legal implication of the dispute really are (as distinguished from each parties and their own attorneys persuade each other they are); and what misunderstanding and erroneous assumptions about the actions and motives of the other party they may have been acting on, their own perspectives change and they begin to see new possibilities to make intelligent decisions and choices that can satisfy the needs of both parties. Understanding often turns conflict into opportunity, and leads to the kind of value added resolutions that give rise to the “win-win” cliché.

Although some degree of understanding might be possible in separate caucuses, Friedman and Himmelstein make a compelling case for their belief that real understanding can best be achieved by having the parties communicating directly with each other in the same room. The parties need to do more than just vent. They want to be heard and understood, not only by the mediator, but by the other party. Facilitating that kind of emotionally laden and tension filled dialogue is extremely frightening and very hard work, but has the potential to pay great dividends. As Friedman and Himmelstein note, mediators who separate the parties immediately are generally doing so for their own comfort, and not because even they believe it is necessarily the best way to proceed. The parties are entitled to more from the mediator.

Challenging Conflict: Mediation Through Understanding is an easy read. Friedman and Himmelstein have avoided the kind of arcane discussions that infected some of the early mediation literature, as if mediation were a science rather than an art. They set out their thesis clearly, and then, in what makes the book so compelling, they discuss in depth ten interesting disputes they mediated using the understanding-based model to demonstrate and explain how and why the approach led to more satisfying and enduring resolutions.

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