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Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation

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MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION. By *Jay Folberg* and *Alison Taylor*. San Francisco: Jossey-Bass Publishers. 1984. Pp. xxii, 392. \$23.95.

As litigation costs rise, people are increasingly turning to alternative ways to resolve disputes. Accompanying this development has been a recent surge in the number of books and articles discussing options to litigation.¹ *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* serves as a handbook for those interested in practicing mediation and as a valuable overview of the mediation process for law professors teaching about alternative dispute resolution (ADR).

The broad scope of *Mediation* distinguishes it from other books in this area. It presents theoretical models of the nature of conflict, dispute resolution processes, and in particular, a proposed seven-stage mediation procedure. It discusses the psychological aspects of mediating conflicts, communicating with disputants, and reading verbal and nonverbal signals. It also addresses such practical concerns as setting up a mediation service and receiving and making referrals.

For those seeking basic exposure to the many facets of mediation, this book is a great resource. The authors' backgrounds make them well-suited to work together to produce such a comprehensive book. Jay Folberg is Professor of Law at Lewis and Clark Law School and serves on the adjunct faculty of the Department of Psychiatry at the Oregon Health Sciences University School of Medicine. He also has eight years of practical experience as a mediator and has served on several committees concerned with family law arbitration.² Alison Taylor serves on the adjunct faculty of the Lewis and Clark Law School and has a private mediation practice. She is a partner in a consulting firm that provides mediation training and services, and is a certified mediator of special education disputes for the Oregon Depart-

1. See, e.g., AMERICAN BAR ASSOCIATION, ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982); J. HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS (1981); Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219 (1982); Kochan & Jick, *The Public Sector Mediation Process*, 22 J. CONFLICT RESOLUTION 209 (1978); Lee, *Defining Success in Environmental Dispute Resolution*, RESOLVE, Spring 1982, at 1. In 1983, the first professional journal devoted entirely to mediation and with principal focus on divorce mediation, *The Mediation Quarterly*, was established.

2. Jay Folberg is president of the Association of Family and Conciliation Courts, past chairman of the Mediation and Arbitration Committee of the American Bar Association Family Law Section, consultant to the National Divorce Mediation Research Project, distinguished affiliate member of the American Association of Marriage and Family Therapists, and on the panel of arbitrators of the American Arbitration Association. Folberg received his B.A. in economics from San Francisco State University and his J.D. from the University of California at Berkeley (Boalt Hall). P. xxi.

ment of Education.³ Folberg and Taylor have also written about mediation and interviewing techniques for both practicing mediators and attorneys.⁴ Together, they have educational backgrounds in both psychology and law. Since Folberg is primarily an academic and Taylor a practitioner, as collaborators they are well-equipped to explain both the practical and theoretical aspects of mediation.

Folberg and Taylor begin by defining mediation "as the process by which the participants, together with the assistance of a neutral person or persons, . . . isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs" (p. 7). The mediator does not force settlement but simply facilitates the negotiation process between the parties by helping them overcome communication difficulties and other roadblocks. The authors propose a seven-stage conflict resolution process for use by mediators to guide participants in reaching an agreement: (1) introduction — creating trust and structure; (2) factfinding and isolation of issues; (3) creation of options and alternatives; (4) negotiation and decisionmaking; (5) clarification and writing a plan; (6) legal review and processing; and (7) implementation, review, and revision. They discuss each of the seven stages in detail, illustrated with sample excerpts of conversations from mediation sessions to show how each stage works and what the parties must accomplish before proceeding to the next level.

Next, the authors discuss the various skills needed by mediators. They consider counseling skills to be crucial because "[m]ediators see people when they are in stressful situations" (p. 91). Participants may feel angry, threatened, or anxious. They may, especially in divorce cases, be grieving their loss. Folberg and Taylor explain how to recognize the signs of these emotions and suggest ways for mediators to respond and create a cooperative and calmer atmosphere. Once again, they provide excellent excerpts from discussions among a mediator and parties, usually in the context of divorce mediation. These examples illustrate types of reactions from parties that could frustrate problem solving; the examples also suggest proper responses for the mediator.

After discussing these mediation skills and methods for enhancing communication, the authors give a broad overview of the different kinds of mediation. They discuss the application of mediation in a variety of fields, including labor and minority relations, educational and housing disputes, and environmental and intragovernmental con-

3. Alison Taylor received her B.A. from Coe College and her M.A. in counseling and personnel from Western Michigan University. Pp. xxi-xxii.

4. *E.g.*, DIVORCE MEDIATION: THEORY AND PRACTICE (J. Folberg & A. Milne eds.) (forthcoming); Folberg & Taylor, *Client Interviewing and Counseling*, in 1 CIV. LITIGATION (J. Folberg, R. Foster, F. Merrill & M. Webb eds. 1982).

flicts (pp. 190-232). But they explore family and divorce mediation more extensively than any other area. This is clearly their field of expertise. Not only do they devote a whole chapter to family mediation, but almost every example they use throughout the book relates to divorce mediation.

In the last part, the authors discuss the practical concerns of training mediators and establishing a mediation practice, including making and receiving referrals. While they do discuss some important decisions, such as whether to mediate in the public or private sector, their practical advice often borders on the mundane, such as when they discuss choosing and arranging office furniture, and scheduling appointments.⁵

The above outline reveals the tremendous range of topics covered in *Mediation*. While its broad scope is the book's main attraction, it is also its chief shortcoming. In their quest to cover a wide range of mediation-related topics, the authors fail to give more than superficial coverage to any single area. As the authors explain, mediation "is a fusion of concepts from the disciplines of psychology, counseling, law and other human services" (p. 73). They also acknowledge that many who do become mediators are already trained in at least one of those areas; for example, many mediators are trained psychologists, social workers, counselors, therapists, attorneys, police officers, or clergy (p. 73). If, as the authors claim, these practitioners are their intended audience (p. xii), many are likely to be disappointed with the book. Such people, eager to acquire the necessary skills outside their expertise, are likely to find the chapters in their field too basic and the chapters covering unfamiliar topics too superficial. The authors seem to be aware of this problem, and provide a list of recommended supplementary sources at the end of each chapter. In addition, they make statements such as the one found at the beginning of the chapter on counseling concepts:

We ask those who have studied these topics in depth . . . to review or simply skim the chapter, keeping in mind that it is impossible to discuss every theory here. Those who have not been trained in psychological theory or counseling . . . will need to read carefully and augment this chapter by referring to the recommended readings. [p. 73]

While the choice may be intentional, it nevertheless reduces the book's value to little more than a handbook that covers the basics.

The second limitation of *Mediation* is the absence of a chapter devoted to comparing mediation to other forms of dispute resolution, most importantly litigation.⁶ The authors have scattered throughout

5. In their section devoted to scheduling sessions, the authors note that "[m]ediators should remember to schedule time slots to relax and refresh themselves after each session." P. 302. While this is certainly important, such common-sense advice seems out of place in a book that is primarily devoted to the substantive and more sophisticated aspects of mediation.

6. The authors give this comparison only summary coverage. Pp. 33-36.

the book comments on the advantages of mediation. But given the youth of mediation as an alternative to litigation, current books on mediation must still convince the reader of the benefits of this choice and address its potential shortcomings. The authors' obvious pro-mediation bias reduces the book's value because it deprives readers of an in-depth critical analysis of mediation.⁷

Folberg and Taylor discuss several advantages of mediation. Mediation, they argue, is an ideal way to resolve disputes between people who will have an ongoing relationship. It leaves the disputants with the feeling not that one lost and one won, but that together they created a mutually beneficial arrangement. It also teaches them how to resolve future conflicts. Furthermore, mediation is usually faster and less costly than litigation. Most important for the authors, "the primary benefit [of mediation] is self-determination" (p. 35). Unlike a trial, mediation allows people to fashion their own solution rather than simply accept one imposed by an outside authority. The authors point out that the absence of procedural and substantive legal constraints in resolving disputes frees the parties to learn about each other's needs and model a personal solution. They further suggest that the resulting agreement reflects the participants' own preferences, and will therefore be more satisfactory to the parties than a decision imposed by others.⁸

In many situations a self-created agreement will be better for both parties than a judgment from a court. Lawyers are not blind to this and usually resort to litigation only when repeated settlement negotiations are unsuccessful. But mediation can pose dangers because "the rules of procedure and substantive law" (p. 10) are absent. When there is an imbalance in bargaining power between the two parties, an unfair agreement may be reached. The less powerful party might concede on issues in order to keep the peace rather than try to assert his or her rights, especially in divorce situations and in employer-employee disputes. In divorce cases, one spouse, usually the primary wage earner, is likely to have much greater leverage. In the labor area,

7. For a more critical analysis of mediation, see K. KRESSEL, *THE PROCESS OF DIVORCE: HOW PROFESSIONALS AND COUPLES NEGOTIATE SETTLEMENTS* 178-279 (1985).

8. In the Denver Custody Mediation Project . . . [e]ighty-five percent of the mediation clients reported that their agreements were "complete and thorough," and a majority felt that the mediated agreements they reached were "perfectly fair." In contrast, only 33 percent of the control group who went through the court process reported the process to be "perfectly fair."

P. 12. *But see* KRESSEL, *supra* note 7, at 197 (citation omitted), which points out that in the DCMP study,

50 percent of the couples randomly assigned to the mediation group rejected the invitation, usually because one spouse refused. . . .

The nature of the bias introduced by the high refusal rate is especially problematic because there is evidence that those who accepted the offer to mediate were less conflictual, better able to communicate, more willing to work together, more affluent, and better educated than those who refused.

the employer is often in a stronger bargaining position, especially if the employees lack union representation.

Conceivably, a mediator could compensate for the absence of legal protections, if she is sensitive to such imbalances and makes certain that the weaker party is not forced into an unfavorable agreement. The authors raise some of these concerns in a section entitled "Ethical, Professional, and Legal Issues" (pp. 244-90). In that section the authors also discuss another shortcoming of mediation — the potential absence of mediator-client confidentiality. There is no statutory mediator-client privilege similar to the attorney-client or physician-patient privileges codified in most states. Thus, if mediation fails and the parties litigate, the mediator may be forced to testify about statements made during mediation. The authors cite several cases in which courts did not require mediators to testify,⁹ but they reluctantly admit that "there are not enough favorable court decisions to guarantee mediation confidentiality" (p. 272). This is not merely a minor issue, but rather a serious drawback for people to consider when deciding which dispute resolution device to choose. If, as the authors imply, a mediator-party privilege may become increasingly accepted and perhaps statutorily required, the problem may evaporate. But the problem currently exists, and the authors' tendency to gloss it over suggests a reluctance to reveal any shortcomings of the dispute resolution technique they are promoting.

Finally, the authors fail to discuss adequately the role of the litigation option, an ever-present backdrop to the mediation process. Mediation occurs in the shadow of the law. Yet one can only infer this role from the excerpts Folberg and Taylor present. For example, in resolving a dispute between divorcing spouses about the proper amount of visitation by grandparents, a mediator stated: "More and more, the courts have been recognizing the rights of grandparents to visit their grandchildren after divorce" (p. 152). In another spousal dispute, one mediator said, "I'm wondering if a judge would see your keeping the house as fair" (p. 166). The same mediator later stated: "You need to discuss this with your separate lawyers to better understand the legal consequences of your decisions and whether they would be acceptable to the court."¹⁰

Although the authors state that the mediator should inform parties of their legal rights, the book fails to convey the importance of litiga-

9. *See, e.g.*, *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980); *Adler v. Adams*, No. 675-73(2), slip op. (W.D. Wash. 1979); *McLaughlin v. Superior Court*, 140 Cal. App. 3d 473, 189 Cal. Rptr. 479 (1983); *Simrin v. Simrin*, 233 Cal. App. 2d 90, 43 Cal. Rptr. 376 (1965). Pp. 265-77.

10. P. 166. Some mediation settlements require judicial ratification. "Mediation cases involving divorce or custody must be processed through the courts and pass legal review by a judge. . . . Cases involving environmental disputes may need to be processed and ratified by a government agency or official." P. 63.

tion as an alternative to the mediation process. Parties bargaining privately think about what a court might award them. They also know they can leave mediation and litigate at any time. The impact of these two factors on the mediation process should have been explored more fully in the book.

In sum, *Mediation* is recommended for three groups of people. Law professors eager to expand their courses into nontraditional areas of ADR will find it a valuable overview. Parties considering mediation will find this book instructive, but not as useful as a more objective book might be. The book is also an excellent introduction for someone considering becoming a mediator. But for its intended audience, mediators themselves, the book will leave all but the most inexperienced disappointed. It serves as little more than a checklist to inform them about the various elements of mediation practice, and as a bibliography of more extensive works in each particular area. It thus joins the ranks of several other recent books in the field as simply an "enthusiastic 'how to' manual addressed to the prospective or novice . . . mediator."¹¹

— *Nancy T. Gardner*

11. K. KRESSEL, *supra* note 7, at 183.