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Book Reviews

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BOOK REVIEWS

ANATOMY OF MEDIATION, MEDIATE DON'T LITIGATE

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Two new introductory books on mediation have been published within the last year. ANATOMY OF MEDIATION[1] is co-authored by veteran labor arbitrator Sam Kagel, who has been practicing and writing about resolving labor-management disputes for 45 years,[2] and Kathy Kelly, also a labor arbitrator and author in the field.[3] MEDIATE, DON'T LITIGATE[4] is written by Peter Lovenheim, a New York lawyer who is former legal counsel and program director for the Center for Dispute Settlement, a public mediation center in Rochester, New York.

ANATOMY OF MEDIATION is a case study of a contract dispute between an opera company and a musicians' union. The facilitated negotiations, which take place over ten days, are presented in the form of an annotated transcript which is introduced by a summary of the four primary purposes of the mediator[5] and the twenty-five topics which are used to accomplish these central purposes. The case study is presented and then dissected in detail in order to describe what the authors call the "keys to success".[6] Finally, mini-case studies are used to portray a complex business dispute, a sexual harassment dispute, a neighborhood dispute, a custody dispute and a family dispute. In the concluding section, mediation is compared to other forms of dispute resolution.

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1. S. KAGEL AND K. KELLEY, ANATOMY OF MEDIATION, WHAT MAKES IT WORK (1989).

2. Mr. Kagel, an 81 year old founding member of the Royal Academy of Arbitrators, authored a similar book, ANATOMY OF LABOR ARBITRATION (2d ed.) (1986), in 1961. He also taught arbitration, negotiation, mediation and labor law at Boalt Hall Law School for 16 years.

3. Ms. Kelly, who graduated from Boalt Hall in 1976, practiced law with Mr. Kagel's firm after graduation and authored a chapter in the second edition of his book, ANATOMY OF A LABOR ARBITRATION, among other arbitration and labor law publications she has written.

4. P. LOVENHEIM, MEDIATE, DON'T LITIGATE, HOW TO RESOLVE DISPUTES QUICKLY, PRIVATELY AND INEXPENSIVELY WITHOUT GOING TO COURT (1989).

5. The four primary purposes of the mediator are:

A. Improving his [sic] effectiveness as a confidant and persuader;

B. Identifying areas of conflict;

C. Resolving the conflicts; and

D. Finalizing the deal.

S. KAGEL AND K. KELLEY, *supra* note 1 (emphasis in original).

6. Id. at 109.

MEDIATE, DON'T LITIGATE is a self-help style book, which explains mediation, instructs disputants step-by-step on how to participate in the process, describes a number of specialized applications such as divorce mediation, business mediation, and community dispute mediation, and tells how to become a mediator. There are also several appendices which list public and private dispute resolution services and referral agencies,[7] and give samples of mediation agreements.

There are many similarities between these two books. Both are well written, chatty, readable, non-scholarly works. Both address an audience of novices rather than experts. Both oversimplify the process of mediation, taking a single style of mediation and describing it globally, as if it were the only way in which mediation is practiced. This monolithic approach to mediation is a particularly dangerous flaw in books aimed at an introductory market, since persons new to mediation may read them and take them as gospel for the only proper way that mediators should behave and mediations should be performed. To explain why I find this approach so disturbing, it may be useful to summarize my own entry into the field of mediation.

The first mediation training I attended was taught by an attorney who had moved from law practice to mediation and finally to weaving prayer rugs in a Taos religious retreat. She told us that mediation was essentially a spiritual process, that we should not worry about rules or structure, but just trust in the power of the process. This came hard to a traditional law professor and eight law students.

When I left this training, I was not confident that I had fully mastered the process and become ready to teach mediation, so I set off for a second training. The approach of this group was totally different from the first trainer in that its mediation method was highly structured: charts, diagrams, graphs, rules, stages, lots of lectures and few role plays. I dutifully wrote it all down, and wondered at the difference. Thoroughly confused, I attended training number three, also quite structured, but even more puzzling because this group's rules contradicted many of those expounded in training number two. For example, group two insisted that mediation worked best when initiated by individual intake sessions. They were big fans of the caucus. Group three took the position that any contact between mediator and individual disputants destroyed neutrality and was improper. When queried about the conflicting information, they shrugged and responded that different things worked for different people.

Training number four was a return to a more spiritual approach to mediation, since this trainer said the heart of his method was to empty himself out and then fill himself up with the disputants. He contradicted all the other trainers, however, by insisting that the role of law in mediation was to be intrinsic and explicit, not

7. These lists, taken in part from the ABA Standing Committee on Dispute Resolution and in part from membership affiliations, are neither complete nor up-to-date. For example, there is only one public mediation group listed for New Mexico when New Mexico has at least five (two of which predate the one which is listed). No private dispute resolution providers are listed for New Mexico when there are more than 50 in the State.

peripheral or forbidden as the others had said. He, as the mediator, was willing to give legal evaluations and predict what a court would do. Training number five was the first to espouse co-mediation, telling us that co-mediation was an assurance of quality, balance, and neutrality of the mediators and teaching it as the only appropriate way to practice mediation. Some of these training sessions saw the job of the mediator as producing agreements, while others called this "muscle mediation" and said that the mediator's role was to provide only the opportunity for agreements.

By the end of this extended introduction to mediation, I felt ready to begin the teaching process. What I had learned from my eclectic exposures was that there were many styles of mediation, and that it was important to give trainees choices, not dogma. As my own practice developed, I chose to act as co-mediator, teaming with several mental health professionals. We continue to co-mediate and co-arbitrate together in a broad variety of commercial, business and family disputes. Our style is probably more spiritual than structured, we place the responsibility for agreements on the disputants, and we selectively incorporate many of the techniques I learned in the different training sessions, when they seem appropriate for particular cases or clients.

Unfortunately, many people writing and teaching about mediation today have little flexibility in presenting the process. Like each of the mediation training sessions I attended, they see only one way to mediate, applying this approach to all categories of disputes and disputants. Both ANATOMY OF MEDIATION and MEDIATE, DON'T LITIGATE, fall into this trap, describing mediation as a highly choreographed event which should only be performed their way.

In ANATOMY OF MEDIATION, the case study and the authors' comments portray a highly coercive style of mediation which may be characterized as muscle mediation. The authors talk about "pressure points" which give the mediator "some muscle"[8] and say that the "mediator is the third negotiator," whose role is to persuade the disputants to come to an agreement.[9] Indeed, they state that the purpose of mediation is to bring the disputants to agreement, and the mediator in the case study proclaims that "when I develop an impression as to what I believe would be an appropriate basis for settling a particular issue, I don't hesitate in the least to try to persuade both parties that they should agree along those lines."[10]

This coercive style may be traditional in the mediation of labor-management collective bargaining. The long history of strikes, lock-outs, violence, polarized positions, adversary arbitration, and full litigation between workers and employers may have left a residue of mistrust which only muscle mediation can penetrate. If so, this case history is an effective vehicle for demonstrating the high pressure wheedling, demanding, threatening, deceptive techniques which are used to bring union and management to agreement.

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8. S. KAGEL AND K. KELLEY, *supra* note 1, at 4.
9. *Id.* at 6.
10. *Id.* at 58.

To present the goal of mediation of all disputes as "full settlement" achieved through mediator "EFFORT"[11] [sic], however, does a disservice to the many mediators who see their role as giving disputants an opportunity to seek their own resolutions. This non-coercive approach to mediation has as its goal facilitating communications, not forcing agreements. The responsibility for outcome is on the parties while responsibility for the process is on the mediator. Interests are seen as a way to move disputants off their positions and expand options to achieve mutually beneficial solutions.[12] Kelly and Kagel, however, see interests as "pressure points" to be manipulated by the mediator. They illustrate this by asserting that the "desire of all parties to work with one another in the future may be brought to bear by the mediator as a pressure point, suggesting that all parties ought to make themselves open to any reasonable resolution put forth."[13]

Even were ANATOMY OF MEDIATION not flawed by this enthusiastic espousal of muscle mediation, the book has a second problem. Of its 192 pages of text, fully 157 are taken up with the case study. Not content with recreating a meticulously detailed transcript of ten days of collective bargaining, the authors employ a number of repetitive pedagogical devices to hammer home their points. These include: socratic dialogues between the mediator and a neophyte observer, summaries of events and further developments, margin notes, footnotes, authors' notes, mediator notes, an "ordered review" of all the skills and techniques employed, and a chronological appendix of all the economic positions taken by the parties during the mediation. This single teaching vehicle wears very thin as points are made over and over while the mediation drags on.

ANATOMY OF MEDIATION showcases a powerful master of labor-management mediation, generalizes his heavy-handed techniques as appropriate to a variety of areas such as family, business, and neighborhood disputes, and does this virtually without reference to other authorities, styles or techniques. It may be that the authors, steeped as they are in a labor arbitration background, were compelled to make these generalizations to interest a broader audience. The result, unfortunately, is the wholesale importation of inappropriate techniques into areas where the authors demonstrate little experience.

Market hype seems to be the watchword of MEDIATE, DON'T LITIGATE which author Peter Lovenheim has been promoting vigorously. On February 3, 1990, Lovenheim appeared on the nationally syndicated Jim Bohanan show, broadcast live from Washington, D.C.. The interview, which lasted over an hour and a half, came replete with a toll free number for listeners to call and order the book. It was characterized by attorney bashing[14] and overgeneralization about mediation, described by Mr. Lovenheim as the primary panacea for interpersonal ills. The book itself contains some well packaged general information and gives an

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11. *Id.* at 157.

12. R. FISHER AND W. URY, GETTING TO YES (1981).

13. S. KAGEL AND K. KELLEY, *supra* note 1, at 161.

14. Mr. Bohanan introduced Mr. Lovenheim as "that rarity among the homo sapian species . . . an attorney who says we should not be dragging each other into court."

overview of the process which, although it may oversell the virtues of mediation, is more balanced than the Kagel-Kelly book.

The major flaw of MEDIATE, DON'T LITIGATE, which is written as a handbook to teach disputants about the process of mediation including what to expect and how to function effectively, is that it takes one style of mediation and generalizes that this is how all mediations should be performed. Clients who read this book will expect that they have an "absolute right" to bring their lawyer with them to the mediation, that their mediator will be bound to protect the confidentiality of communications by an "oath of office", that public mediation will be free, and that mediation is conducted as a "hearing" to which disputants are advised to bring a variety of evidence including: live witnesses, documents, business records, opinion testimony, and experts. Disputants are even told to expect a "weapons check" at the beginning of a mediation. Finally, disputants are advised to "check up on" their assigned mediator and request the kind of mediator they want from their public mediation center. Since none of these things bear any relation to any mediation I have ever seen or conducted, I must fervently hope that no New Mexico disputant reads this book.

Not only does Lovenheim describe the process apparently utilized by his local mediation center as that which is used everywhere, but he also incorrectly discounts other types of public centers. For instance, he relegates court connected justice centers to the role of resolving minor criminal complaints without prosecution, stating that "[t]hese court-connected programs serve a useful function, but most are limited to hearing criminal matters and do not offer the truly voluntary, diversified, formal mediation we have been discussing."[15]

Overall, Lovenheim's book, like that of Kagel and Kelly, contains some useful information, but is seriously flawed by its narrow viewpoint. Both books would be enhanced by improved documentation of resources, particularly when they vaguely describe "leading authorities" and either confirm or refute them without ever pausing to identify them. As a practitioner of co-mediation, I would also like to see more discussion of this model. Kagel and Kelly never refer to it, while Lovenheim discounts it as a mere learning stage. In his chapter on how to become a mediator, Lovenheim says that the steps are to: 1) take a training, 2) observe one or two mediations, 3) co-mediate "a few cases with an experienced mediator," and 4) you are ready to solo mediate and handle cases on your own.[16] If only each book had contained the caveat that it was describing one of many ways to perform a process, and given some space to recognizing alternatives, each would have been a far more valuable resource. As the books stand, however, each would require substantial disclaimers before they were given to persons interested in mediation to teach them about the process.

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15. P. LOVENHEIM, *supra* note 4, at 51. In many jurisdictions, court annexed programs mediate the full gamut of disputes from civil, to criminal, to family, to custody. Indeed, the multi-door courthouse model offers mediation, facilitation and arbitration for all these categories of disputes.

16. *Id.* at 218.