BOOK REVIEW:

Dwight Golann, *Sharing a Mediator's Powers: Effective Advocacy in Settlement* (ABA 2013)

Book review by Jan Frankel Schau (ADR Services, jfschau@schaumediation.com)

Mediators must not only balance two sides of a conflict, but also maintain their own balance to provide a fair process while settling contentious lawsuits with impartiality and finesse. When I sat down to read Dwight Golann's *Sharing a Mediator's Powers: Effective Advocacy in Settlement*, I was struggling to regain my own balance after just having mediated a challenging wrongful termination case in which one lawyer was a notorious bully. The case eventually settled on terms suggested in my mediator's proposal, but I wondered if perhaps the aggressive advocate had pushed me off balance and succeeded in getting a better result than a more genteel lawyer would have.

Professor Golann offers comfort by presenting concrete approaches for reality testing, evaluative feedback and simply assuming the role of "weather forecaster" instead of mediator as manipulator. In essence, he suggests the mediator offer an honest broker's approach by forecasting the climate in the courtroom and at times in the other caucus room as well.

One interesting example of why this is important is an experiment with Harvard students who were given identical fact patterns and assigned a side to represent in a hypothetical dispute. Those assigned to represent the plaintiff assessed their chances of success 20% higher than those representing the defense. What's more, both business and law students representing the plaintiff assessed the likely damages as 50% higher than those representing the defendant. It is no wonder so many cases require a neutral third party to do reality testing and mediate these disputes.

The book itself reads a little like a typical mediation (and also demonstrates a mediation in the included Advocacy DVD that is referenced throughout the book). There are many layers: Golann looks at the perspectives of the advocate, the client and the mediator, deftly shifting between them as each chapter unfolds. Like a mediation, the numerous issues – from emotional concerns to bargaining strategies – arise unexpectedly and not in a linear fashion. Indeed, sometimes the sidebar text boxes with real case examples overshadow or confuse, rather than illustrate, the pedagogic purpose intended.

Golann offers advocates solid and insightful advice about ways to "use" the mediator to achieve optimal outcomes. For example, he recommends that advocates contact the mediator in advance to make sure that the opposing side has all the right people at the negotiating table. He advises lawyers to openly discuss process and consider whether a joint session or private caucuses will work best. He even suggests that the advocate deliberately influence the agenda for the mediation by stressing the most important points and avoid addressing weaker points until required or requested to do so. Finally, he recommends that advocates use the mediator to convey data to the other side in order to avoid reactive devaluation.

Golann acknowledges that how the lines are delivered in mediation is as important as the content. For this reason, he advises advocates to carefully and deliberately control the flow of information. Interestingly, he recognizes how confidentiality statutes can be used to the advantage of the advocates and mediator in the

deliberate slow leak of information, with purposeful holding back when useful. He also offers advice to advocates to co-opt their mediator so that the mediator is conveying messages as though she has adopted them as her own. Instead of saying, for example, "They are telling me that $100,000 is their final offer", the advocate should get the mediator to affirmatively state, "They are offering $100,000 and I think that is as far as they will go." Language matters.

One of the most insightful parts of the book for me was recognizing that because mediations offer the possibility of settling in a single day a dispute which may have been going on for years, there is sometimes a genuine "loss reaction" in settlement. Where the parties to a lawsuit may have dreamed for years of being victorious (and perhaps economically transformed), they are asked not only to give up that chance, but to maintain strict confidentiality about it. Mediators and advocates who are sensitive to these dramatic emotions are well served, in the words of Professor Hal Abramson, to consider the end point like a fine wine and simply "let it breathe."

The concept of "sharing the power" is best illustrated by the image of a three-sided negotiation with the opposing sides and the neutral forming a dynamic triangle. Golann suggests that while "bargaining with a mediator is civil and principled, [the advocate] and the neutral have different goals: the mediator will ordinarily be content with any terms acceptable to both sides, while [the advocate] is seeking the best possible outcome for [the] client." One of the most effective ways to achieve this, he says, is by combining "hard terms" with a "soft delivery."

We have all observed the smooth negotiator who is always in control and somehow consistently achieves the best outcome for his clients in mediation. Like a good chess player, that advocate will make strategic moves – some small and some sweeping – to get to his goal. This book dissects the smooth negotiator's behavior to describe in detail every step of the process. In the hands of a skilled chess player, there are many options, potential setbacks and ultimately carefully calculated moves, using every chess piece to his advantage. Checkmate.

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