

BOOK REVIEWS

Mediating for Money

Making Mediation Work in Civil Cases

Reviewed by Richard T. Cassidy, Esq.

Mediation has become commonplace in the American legal scene. That is true here in Vermont as well. Almost every family law, superior court, and environmental case brought in Vermont is mediated before considered ready for trial. So are most civil cases filed in United States District Court for the District of Vermont. Even criminal prosecutions may soon see the influence of mediation if a pilot project in criminal case mediations recently announced by the American Bar Association proves successful.

As mediation has grown, so has the discussion, literature, and training that surrounds it. Most mediation literature—and perhaps even the development of mediation itself—traces back to Fisher and Ury's seminal book, *Getting to Yes: Negotiating Agreement Without Giving In* (1983). Their work highlighted a very useful negotiation technique: the problem-solving model of negotiation. Mediators working within the model encourage parties to a dispute to move away from arguing about their positions and towards a mutual search for resolution based on recognition of the parties' needs and interests. For many cases, divorce mediation being a prime example, helping the parties to sort out their needs and interests is a base from which agreement becomes attainable.

Fisher and Ury's perception has changed dispute resolution and the practice of law. As profound as it is, the problem solving model has significant limitations. So does its analogue, so called "transformational mediation." As Andy Little points out in *Making Money Talk*, one of these limitations is that these models are simply not appropriate for many disputes. Negotiating the settlement of simple money cases—and personal injury claims and commercial disputes are usually simple money cases—is inherently a traditional, position-based bargaining process.

Lawyers and mediators who think that mediation plays no constructive role in making traditional positional

negotiations work would benefit from reading Little's book. Skilled mediators need to come to the table with the right skills for the nature of each dispute and the disputants before them. Little's book can help fill out a mediator's skill set and can help lawyers who advocate in mediations sharpen their own negotiation expertise.

Little goes far beyond describing the usual mediation models. He shows would-be mediators how they can promote straightforward traditional horse-trading by easing the flow of information, encouraging case and risk analysis, and facilitating changes in the parties' positions. He explains that the tools of the mediator's trade include strategic and tactical questions, reframing and reflective summary statements, brainstorming to help develop new ideas, observations about the negotiation process, and suggestions for obtaining movement.

Making Money Talk: How to Mediate Insured Claims and Other Monetary Damages,
J. Anderson Little.
American Bar Association,
2007, 269 pp., \$42

He explains the idea of the second negotiation: bridging the gap between the party's best numbers. His experience as well as his theory-based knowledge becomes obvious in the chapter entitled "Responding to Recurring Problems of Movement in Traditional Bargaining: 25 Settlement Conference Clichés."

Little's book may not be a substitute for serious, advanced mediation training or for long years of experience as a mediator. But, in my experience, for mediators working to resolve cases pending in civil trial courts, it is by far the best single resource available.

Richard T. Cassidy, Esq., is a principal in the Hoff Curtis law firm in Burlington. He has nearly thirty years experience in civil litigation, and since 1994 has devoted a substantial portion of his practice to work as a mediator. He is a member of the Board of Governors of the American Bar Association, the ABA Dispute Resolution Section, and the VBA ADR Committee.

