

Book Review

**Mediate, Don't Litigate: How to Resolve
Disputes Quickly, Privately, and
Inexpensively Without Going to Court
(Peter Lovenheim, New York: McGraw-Hill
Publishing Co., 1989)**

Reviewed by Jay E. Grenig*

Mediate, Don't Litigate by Peter Lovenheim¹ is a nuts and bolts book for persons with little or no experience with mediation. While its approach is rather basic, experienced mediators and lawyers may also find its suggestions, forms, and checklists helpful. The book explains how mediation works and encourages the reader to use mediation to resolve disputes.

An ardent advocate for mediation, the author writes almost too enthusiastically that:

Mediation can save you from wasting time and money; it can free you from lawyers and the foreign language of the law; it can empower you to work out solutions to your own problems — quickly, fairly, and inexpensively — so that you can get on with your life; it can protect your privacy and dignity from exposure of your problems in newspapers and on TV; it can help you solve your problems without destroying your important personal, family, and business relationships.²

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1. Peter Lovenheim is a graduate of Cornell Law School. He has served as legal counsel and director of program development for the Center for Dispute Settlement, Inc., in Rochester, N.Y.

2. P. LOVENHEIM, *MEDIATE, DON'T LITIGATE* 18 (1989). For a discussion of a recent study on the appropriateness of mediation, see Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 OHIO ST. J. ON DIS. RES. 129 (1989). For a critical examination of the role of mediation in child custody matters, see Bruch, *And How Are the Children? The Effect of Ideology and Mediation on Child Custody Law and Children's Well-Being in the United States*, 2 INT'L. J.L. & FAM. 106 (1988).

The book is divided into three parts. Part One discusses why a person should mediate. Part Two explores the mediation process, including how to start and prepare the case, how the mediation hearing works, how to write an agreement that works, and what to do if no agreement is reached. Part Three discusses the mediation of special disputes -- divorce mediation, business mediation, and community disputes. In addition, a chapter on how to become a mediator is included in Part Three.

In Chapter Two, the book provides a helpful summary of ten factors to be considered when deciding whether to mediate a dispute. The five factors favoring mediation include: obtaining a remedy the law cannot provide, preserving relationships while solving a problem, keeping the dispute private, minimizing costs, and settling the dispute promptly.³ The five factors opposing mediation are a desire to prove the truth or set a legal precedent, a desire to go for the "jackpot" (possibly interpreted as greed), the absence or incompetence of a party, the unwillingness of a party to mediate, and cases involving a serious crime.⁴

Chapter Four, on how to start a mediation case, is one of the best in the book. This chapter provides a detailed, comprehensive discussion of how to submit a dispute to mediation, including the pros and cons of public mediation centers, court-connected "justice centers," and private dispute resolution services. Consistent with the author's background with a public mediation center, he recommends public mediation centers for most categories of disputes.⁵ However, he does suggest that if a consumer complaint or employment dispute involves more than five thousand dollars, a private mediation service might be more cost effective and offer greater expertise.⁶

Brief instructions are provided on how to describe the dispute on the submission form. In order to avoid triggering what the author refers to as "the 'litigation response' in your opponent and [sending] him or her to a lawyer rather than to mediation," the author recommends that the dispute not be described in legal terms. For example, rather than describing a dispute over shrubbery as a "breach of contract," he suggests that it be described as "dissatisfaction with shrubbery plantings."⁷

In Chapter Five, the book outlines approaches to preparing for the mediation hearing. Pointing out that the rules of evidence are inapplicable to mediation, the author recommends that in deciding what evidence to use, parties should ask "Will it help me tell my side of the story in a clear

3. P. LOVENHEIM, *supra* note 2, at 22-26.

4. *Id.* at 26-29.

5. *Id.* at 53-54.

6. *Id.*

7. *Id.* at 57.

and persuasive way?"⁸ The author discourages parties from bringing lawyers to a mediation hearing, commenting that "many lawyers are so accustomed to the adversary system of litigation and so unaccustomed to the cooperative system of mediation that they often do not know how to act in mediation."⁹ This sweeping generalization by the author, a lawyer himself, ignores the progress the legal profession has made in understanding and accepting mediation, as well as including it as part of the practice of law.¹⁰

Although the author takes the view that lawyers are not needed at the mediation hearing, he does suggest that, in appropriate cases, a party may wish to consult with his or her lawyer before or after the hearing. Noting that an agreement may be conditioned on the approval of the parties' lawyers, he recommends that a party not condition an agreement on the lawyers' approval unless significant amounts of money, property, or important legal rights are involved.¹¹

Chapter Six gives a helpful, detailed explanation of what to expect and how to proceed once inside the hearing room. The author divides the hearing into six stages. The first stage is the mediator's opening statement, in which the mediator describes the hearing procedures. In the second stage each party gives his or her opening statement, telling the mediator and the other party his or her view of the dispute. The author recommends that parties tell their stories chronologically, use dates carefully, display evidence as they tell their stories, and do not conclude with a demand. According to the author, concluding with a demand makes it harder for a party to change his or her position later.¹²

In stage three the parties discuss their dispute with each other. The author cautions that there is a tendency for things to get out of hand at this stage and so the mediator will normally try to stay in control.¹³ During this stage the mediator is searching for the facts behind the dispute, demonstrating empathy, encouraging possible terms for settlement, proposing possible settlements, and attempting to relieve tension.¹⁴

During stage four, the caucus stage, the mediator meets privately with each party in order to give the mediator a chance to talk more informally and candidly. The book lists several questions a mediator is

8. *Id.* at 67.

9. *Id.* at 73.

10. Hermann, Book Review, 5 OHIO ST. J. ON DIS. RES. 459, 465 (1990) (reviewing J. FOLBERG & A. MILNE, *DIVORCE MEDIATION THEORY AND PRACTICE* (1988)).

11. P. LOVENHEIM, *supra* note 2, at 74.

12. *Id.* at 88.

13. *Id.* at 91.

14. *Id.* at 92-93.

likely to ask during a caucus.¹⁵ Stage five is the negotiation stage in which the parties attempt to solve the problem, looking to the future and focusing on their interests -- not rights. Finally, if the mediation is successful, closure occurs at stage six. At closure the parties agree to a resolution of their dispute.

Chapter Seven is devoted to instructing the disputants on how to write an agreement that works. The chapter includes examples of words to avoid and specific terms to include.¹⁶ It also includes a brief description of basic contract law. The chapter is probably too basic for lawyers (although the brief section on plain English would help many) and it contains too much detail for the unsophisticated person who is involved in mediation for the first time.

Chapter Nine provides some useful advice on modifying agreements and obtaining compliance with an agreement. Brief explanations are given for using a mediation center to assist in obtaining compliance, suing on the contract, and starting over in court.

The portion of the book devoted to mediating special disputes is rather elementary and almost too general to be of assistance in business or divorce disputes. Other books provide a more in-depth discussion of divorce mediation.¹⁷ Wisely, the author warns that divorce mediation is not a substitute for the use of lawyers in the separation and divorce process. He recommends that each spouse have his or her own lawyer to consult as needed during mediation and to review the agreement.¹⁸ The section on business mediation contains brief descriptions of alternative dispute resolution techniques in addition to mediation, including mini-trials, private judges, and in-house mediation.

Although the first twelve chapters of the book are devoted to advice for parties to disputes, Chapter Thirteen offers advice to persons who are interested in becoming mediators. The chapter discusses qualifications, training, and the demand for mediators. Acknowledging that the

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15. What do you really want to happen?
What do you think is the proposal to which both of you most likely would agree?
If you were in the other person's shoes, how would you feel?
What would you do?
What will you do, if both of you do not reach an agreement?
How much will not agreeing cost you?
How would it feel to walk away just now, with the whole matter settled satisfactorily?
What are some fair ways of settling this problem, fair to you and to the other side?

Id. at 96.

16. *Id.* at 105-06.

17. See, e.g., L. MARLOW & S. SAUBER, *THE HANDBOOK OF DIVORCE MEDIATION* (1990), and J. FOLBERG & A. MILNE, *DIVORCE MEDIATION THEORY AND PRACTICE* (1988).

18. P. LOVENHEIM, *supra* note 2, at 153.

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number of opportunities for full- or part-time work as a paid mediator is small, the author suggests that those who choose to specialize in divorce mediation may have a somewhat easier time getting established.¹⁹

The book contains several useful appendices, listing public mediation centers, private dispute resolution centers, resources for divorce mediation, and resources for community and environmental mediation.

This book provides a highly readable, knowledgeable discussion of the benefits of mediation as well as instructions on how to use mediation. However, the book may be too long for the consumer who is involved in mediation only once in a lifetime and it may be too basic for persons, including mediators and lawyers, who are regularly involved in mediation.

19. *Id.* at 217.

