

A new approach to mediating disputes

When parties need to resolve a personal or business dispute, they often hire a mediator. That mediator typically follows a familiar script: caucus with each party separately, probe each side's interests, and take the lead in developing an agreement that satisfies everyone involved.

In their new book, *Challenging Conflict: Mediation Through Understanding*, published jointly by the American Bar Association and the Program on Negotiation at Harvard Law School, Gary Friedman and Jack Himmelstein question this traditional approach, which they say often gives mediators too much power in determining the outcome of a dispute.

The authors, cofounders and codirectors of the nonprofit Center for Mediation in Law, have developed an “understanding-based” model of mediation that encourages direct communication between parties and gives them greater responsibility for determining the outcome of the dispute. In their book, Friedman and Himmelstein describe how this process works using 10 detailed case studies from Friedman’s personal experiences as a mediator.

A deeper involvement

Because mediators traditionally take the lead in a mediation process, establishing ground rules and presenting proposals, disputants often come to view them as authority figures, write Friedman and Himmelstein. This structure can breed a passive mindset that causes parties to feel coerced and powerless over their own fate.

By contrast, the understanding-based model puts disputants in control of the process—a formula for more lasting and

mutually satisfying resolutions, according to Friedman and Himmelstein. Specifically, the approach promotes the following four principles:

- 1. Understanding, not coercion.** The disputants themselves actively participate in decisions concerning how the mediation process will unfold. With the mediator’s help, they negotiate who should be present, and how they will move forward and under what conditions.
- 2. Party responsibility.** Instead of ceding power and control to the mediator, disputants have responsibility for reaching a resolution that pleases all sides. In particular, the mediator encourages disputants to recount the history of their conflict and fosters mutual understanding through active listening.
- 3. Working together.** Rather than engaging in shuttle diplomacy, the mediator gathers in the same room as the disputants and any lawyers who may be representing them and encourages everyone to work together to resolve their differences.
- 4. Going deep.** The mediator strives to help parties identify the tensions underlying their conflict with the goal of revealing previously hidden interests, feelings, and concerns.

BOOK NOTES

From negotiation to disputes

If the understanding-based approach to mediation sounds familiar, that’s because it’s related to the same interest-based approach to negotiation promoted in this newsletter. Lawyers, mediators, and other negotiators who recognize the value of a collaborative approach to bargaining are likely to find that *Challenging Conflict* offers a useful template for applying these proven principles to seemingly intractable disputes.