

BOOK REVIEW: Debbie De Girolamo, **The Fugitive Identity of Mediation: Negotiations,** **Shift Changes and Allusionary Action (Routledge** **2013)** Book review by Jan Frankel Schau (ADR Services, jfschau@schaummediation.com)

Many try to link theory to practice, yet mediation stubbornly defies scientific evaluation, particularly in the context of litigated cases. So I expected to dislike Dr. Debbie De Girolamo's treatise, *The Fugitive Identity of Mediation: Negotiations, Shift Changes and Allusionary Action*. De Girolamo's work began as a doctoral project in London in 1988, which she updated and published in 2013. It remains unmistakably academic: well-footnoted, based on scientifically rigorous research and highly detailed. Yet I was caught up in the fascinating questions raised by De Girolamo's many spot-on observations about how the practice of mediation has evolved into something dark, chameleon-like and yet magical. And so I read on. De Girolamo spends a full chapter defining and refining the term 6

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"mediation" only to conclude that, during the process, the mediator will employ whatever techniques are necessary to

further the mediator's own unique vision of mediation. She notes that the old grid offered by Professor Leonard Riskin of evaluative versus facilitative mediation styles has given way to a newer grid which contrasts directive with elicitive, with room for both styles in a single mediation. Rigid dichotomy of mediation styles has evolved into more flexible, responsive and adaptable approaches. In any given mediation, the mediator may adopt a panoply of tactics ranging from a Bush & Folger- like transformative approach to a narrative, insight or activist one. No wonder mediation is such a fugitive! Even the use of the term "tactics" made this mediator contemplative and even a bit uncomfortable, as we outwardly strive to be transparent and entirely impartial.

Ultimately, De Girolamo argues, the key is to know how and when to transition between phases of the negotiation in order to best assist the parties towards their intended goal, whether that is to settle the dispute, repair relationships, educate disputants about their rights and obligations, or simply to enhance communication. The mediator must be infinitely flexible in order to accommodate the various needs presented at every moment of every dispute. Indeed, the acknowledgement that there may be numerous goals in any mediation that go beyond settling a litigated case for payment of damages is a refreshing reminder of the breadth of the practice.

The author as doctoral student took an "ethnographic" approach to her studies, describing the phases of mediation and then observing the magical, yet predictable shift from the initial phase of articulating positions and exchanging information to the bargaining phase, which she describes as coincident with a shift from competitive to cooperative negotiation.

Despite being naturally resistant to rigorous scientific study, De Girolamo followed around several high level British mediators in real time and reported her findings by interviewing the mediators and observing the effect they had on the dispute and disputants.

The parts I enjoyed most in the book were those that caused me to be introspective about my own processes. She raises the question, for example, whether all mediators are actually manipulative, and whether we simply disguise being directive as

party autonomy – allowing the parties to consider the ideas we suggest as their own. She also raises the question of the sometimes slim line between evaluative mediation and bullying. As chief interventionist, are we mediators not being asked to bully the other side for the sake of getting a deal which the stronger side demands?

De Girolamo also provokes an examination of ethical practice in the context of mediation. She provides an example of an avid fisherman/mediator who developed great rapport with the corporate defendant who manufactured fishing equipment. As a customer of the goods, did that create an unfair advantage for the manufacturer or was it simply a more blatant example of developing connections, which mediators routinely attempt to do with whatever commonalities they can find? Despite raising and getting the parties to waive the “conflict,” the non-corporate plaintiff still wondered whether he achieved a fair deal due to the fishing commonality.



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The author queries which direction power flows in a mediation. Do mediators gain whatever power they have by obtaining the confidence and trust of the parties and do parties surrender too much power to the mediator? While the mediator is busy empowering the parties, is he also creating an illusion that will allow the mediator himself to seize power to finish the deal when the time is right? These are just some of the dark secrets unmasked in this compelling book.

One of the most insightful features of the book was the author's interviews of parties following mediations. The responses she received were both candid and revealing. My personal favorite was: "I expected more leading from the Mediator but he was not

prepared to give it. He was at pains to be even-handed, which can become quite vexing" (p. 138).

De Girolamo illuminates the subtleties of mediation while detailing the strategies of several well-regarded British mediators. Some openly declare they are resistant to adopting a strategy, lest it lead them to a conclusion towards which the entire process may turn its focus. De Girolamo notes that the usual understanding of empowerment in mediation literature is to empower the parties, but the data suggests otherwise. It is the mediator who is empowered by the parties' empowerment. If this is true, it is certainly not a fact that most mediators would willingly disclose to the parties.

The conclusions I drew from De Girolamo's work were at times vexing and at other times empowering indeed. The book is definitely worth reading for both students and teachers of mediation. As for advocates, I would skip it. After all, mediator confidentiality is still sacrosanct and the dark side of mediation that is revealed here should not, in my opinion, be spread broadly to those who still believe in the magic and power of the negotiating process as we engage it in mediations. As we say in the U.S., "if it ain't broke, don't fix it."