



View from the Middle of the Road

Confessions of a successful mediator: how to get to yes

REVIEWED BY BRUCE FRIEDMAN

Jan Schau, Author

All trial lawyers share the experience of walking out of the courtroom and immediately engaging in self-criticism of our performance. Did I answer the court's question? Was it the best answer? I should have said . . . I should have asked a different question on cross-examination or maybe I should not have engaged in cross-examination at all. Hopefully, this self-examination is how we grow as trial lawyers, as we learn from our failures much more than our successes. And while we may discuss our internal critique with our law or life partners, we rarely share them with others. After all, it is not easy to admit our mistakes or doubts about whether we did the best job that we could have done.

When it comes to mediation, a process that all of us engage in far more often than trial, we may not be quite as self-critical. After all, we spend most of our time learning and practicing trial advocacy skills, not mediation advocacy. But we need to learn more about how to become effective mediation advocates. This is Jan Schau's contribution to the profession in her book, *View from the Middle of the Road: A Mediator's Perspective on Life, Conflict and Human Interaction*. Not only does Ms. Schau engage in the critical analysis of her own performance as a mediator, she also provides observations of counsel's conduct and most importantly, she shares that analysis with all of us. The book allows counsel and mediators the opportunity to learn mediation techniques and strategy from the perspective of an effective, open and honest



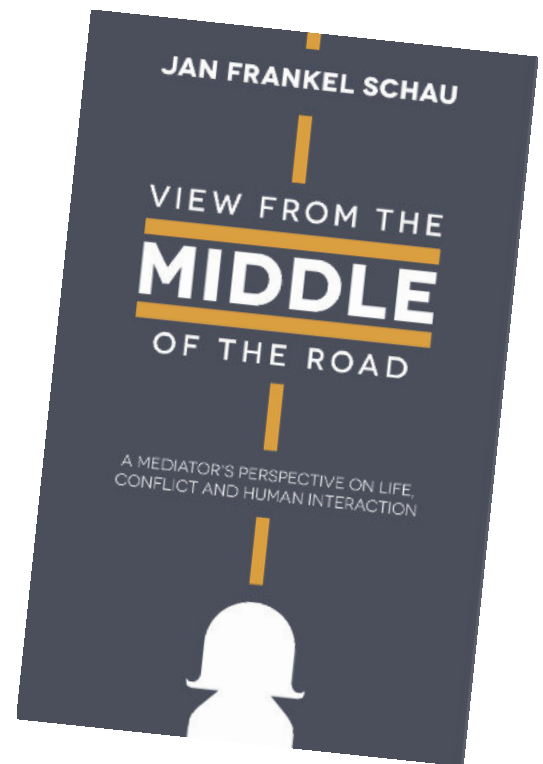
Schau

practicing mediator. The book discusses the tools necessary for an effective mediation in the context of actual mediations that Ms. Schau has conducted. This is

the most effective method of teaching mediation skills because, like anything else, we understand and learn from the context of the mediation itself rather than a set of sterile mediation tips.

Throughout the 12 mediations that she discusses in her book, I was impressed by the honesty and confessional nature of Ms. Schau's description of her performance as a mediator. The mediations cover many substantive areas of law; from personal injury and employment to real estate, probate and commercial litigation. Ms. Schau takes on the failed mediations as well as the successful ones, describing the cases, the parties' positions, the personalities of counsel and the parties and the circumstances surrounding the cases that contributed to either the success or failure of the mediations. We learn from Ms. Schau's analysis of where the mediation got off-track and what she did to get it back on-track or what in retrospect she would have done to steer counsel and the parties toward a successful resolution of the case. Through it all, it is clear that Ms. Schau is a talented, thoughtful, caring and committed mediator with a dogged determination to get to yes.

The book is structured in four sections addressing preparation, surprises,



strategy, and results. Each section is concluded with notes on key mediator tools in each context. In the section on preparation, Ms. Schau discusses the need for counsel to discuss their positions with each other prior to the mediation in order for them to be in a position at the mediation to address the strengths and weaknesses not only of their case but of the opposition as well. She also stresses the importance of counsel engaging in a pre-mediation discussion with the client of a realistic assessment of the case and damages which in turn allows for the ability of counsel to engage in a discussion of this



assessment with the mediator. The timing of the mediation in the context of the litigation process and the need for confidential communication between counsel and the mediator regarding client control issues and any problems with opposing counsel are addressed and encouraged. Ms. Schau emphasizes how important it is for counsel to assist the mediator in seeing the world from their client's perspective and how constructive this effort is in leading to successful resolution of a case.

In the section of the book on surprises that arise during mediation, Ms. Schau describes three mediations which provide examples of facts and feelings underlying the dispute that come out during the mediation and must be dealt with in order to reach resolution of both the case and the emotion driving the dispute. First, the book addresses a mediation in which there is a disclosure by one of the parties of the deepest and darkest family secret in the context of a probate case. Ms. Schau demonstrates the sensitive manner and mode of addressing this potentially explosive information in order to not only settle the case, but allow the parties to leave the mediation with a future. She then turns to a mediation in which the interests of counsel and client diverge, the ethical implications of the

situation, and how the difference was overcome in order to reach an out-of-the-box settlement in which an employee returned to work for the employer that she had sued. Finally, Ms. Schau presents a mediation with a lawyer as a party and the unique challenges that a lawyer party presents to the mediator and counsel.

The final sections of the book focus on getting results and consider a number of mediations and techniques for reaching a resolution. For example, in a claim for wrongful termination of a bank manager suffering from a stress disorder, Ms. Schau describes her use of a joint session between counsel and of a mediator's proposal to reach success. In another case involving a commercial loan by one neighbor to another, the book addresses techniques to deal with aggressive counsel and the importance of patience and providing the time necessary to allow the parties to reach resolution on their own. And then there is the case of the security guard for a major department store who assaults a customer he suspects of shoplifting in the parking lot of the store. Here, Ms. Schau demonstrates techniques to get the parties into the "zone of possible settlement."

Through the entirety of the book, Ms. Schau not only demonstrates her

humility, sensitivity, and empathy for others, she also shows her determination to stick with the mediated case until it is resolved. I highly recommend reading her book, *A View from the Middle of the Road*.

A View from the Middle of the Road, by Jan Schau, published by Author House, is available at www.ViewFromtheMiddleoftheRoad.com.



Friedman

Bruce A. Friedman is a neutral at ADR Services, Inc. After 37 years of trial and litigation experience in the fields of insurance coverage and bad faith, professional liability, real estate, securities and consumer class actions and business cases, he joined ADR Services in 2011. Each year since 2004, he has been named to the Best Lawyers in America, Chambers, and Super Lawyers lists in the fields of insurance, business, and "bet the company" litigation. He has a top ten plaintiff's verdict in a bad faith case arising out of the Northridge earthquake and in 2012 he was named the best insurance lawyer in Los Angeles by Best Lawyers in America.

