Making the Best Use of Mediators and Their Role

Reviewed by John R. Phillips

Sharing a Mediator’s Powers: Effective Advocacy in Settlement
By Dwight Golann

Dwight Golann has, perhaps for the first time, brought together in concise, usable form a variety of insights about how advocates in mediation can make the best use of and work with mediators of various skill levels. Advocates often err on the side of extremes, either trying to control the mediation process or sitting idly by, expecting the mediator to be knowledgeable and effective in soliciting information from the parties to bring about compromise. In reality, while the mediator may have substantial influence, knowing how to work with that influence and power is immensely helpful for advocates.

Sharing a Mediator’s Powers: Effective Advocacy in Settlement and its accompanying DVD focus on how to make the most of the mediator. Many experienced mediators have a specific pre-mediation process, but some spend little time and effort preparing the parties. Golann encourages advocates not only to initiate the pre-mediation preparation if the mediator is not proactive but to help shape the process by educating both the mediator and the client. That includes making sure that the key parties are present, that the mediation process is one everyone agrees to, and that before the parties get to the table, the mediator has enough information and guidance to take full advantage of this chance for the parties to meet, however briefly, in mediation.

In setting the stage for how advocates can best use a mediator’s power, the book lays the groundwork for understanding a successful commercial mediator’s basic strategy or general game plan as follows:

• Build a foundation for success
• Allow participants to argue and express feelings
• Moderate the bargaining
• Seek out and address hidden issues
• Test the parties’ alternatives
• Intervene to overcome a bargaining impasse

Identifying and addressing issues and process in advance, Golann notes, is of primary importance. If the mediator does not include this step or have a plan for it, Golann suggests, advocates can ask for a private meeting or telephone conference to make sure the ground is covered.

The video chapters revolve around a hypothetical contractual dispute between a resort, Cultural Bubble, and the maker and installer of stage lifts, Fine Arts Fabricator. The DVD has a total of 25 chapters or “vignettes” (not correlated numerically or by title to the book chapters) that are easily integrated into the 14 chapters in the book. Using the hypothetical facts as the focus, the vignettes allow the reader/viewer to see demonstrations of good (and sometimes bad) mediation advocacy in setting up the process, preparing the client, and using the mediator’s powers and role effectively. In each chapter, the reader is guided to an appropriate video vignette. For example, Chapter 1 and Chapter 2 cover pre-mediation telephone calls or conferences, and the initial vignette demonstrates poor advocacy as the plaintiff’s counsel attempts to lobby the mediator substantively on the merits of the case. The next video tracks with the second chapter, demonstrating effective advocacy in the...
Golann provides examples of effective (as well as ineffective) opening statements along with guidance for how to work collaboratively to obtain additional information both in the opening session and afterward. Chapter 4 of the video, “An Ineffective Opening Statement,” shows the plaintiff’s attorney in “attack mode,” claiming incompetency by the defendant and accusing the defendant of lying, an approach destined to elicit a negative reaction and defensiveness from the defendant. The next video is a “retake” of the opening statement by plaintiff’s counsel in which the lawyer sets forth the plaintiff’s underlying interests in a straightforward, collaborative fashion.

Another insightful topic is how to use the mediator’s skills to facilitate a release of emotions and, on occasion, how to encourage a mediator to persuade a party to talk with an opponent or to step out of his or her usual facilitative role and empathize with parties who appear to be allowing their emotions to overrule good judgment. As Golann states, “simply having a mediator offer her presence and understanding can help people move beyond difficult feelings.”

In Chapter 6, Golann suggests eliciting advice from the mediator about bargaining proposals. If a mediator is reluctant to take authorship of a proposal, Golann says, he or she may be willing to endorse it as a good-faith step the mediator can help people move beyond difficult feelings.

Chapter 7 emphasizes cooperative or interest-based negotiation and suggests how to utilize the mediator’s power to identify underlying interests that may not be readily apparent at the beginning of the mediation. Both the book and the DVD offer examples of effective ways to identify interests.

Sometimes a party is reluctant to participate in interest-based negotiations and instead resorts to positional bargaining. Chapter 8 provides detailed advice on how to use — and respond to — competitive and adversarial tactics. To expand on these topics, the reader is guided to one vignette on the DVD entitled “Sending Multiple Messages: Interests and a Hard Offer.” The DVD shows how the mediator may encourage the parties to reciprocate by sending a hard offer with an agreed-upon “mixed message.” After being elicited for advice, the mediator may be supportive of combining a “hard” position in reaction to positional bargaining with a soft delivery or with a “private” signal of flexibility.

Chapter 11 is devoted to developing an advocacy plan, both planning for negotiation and planning for the mediation, and even provides an example of a confidential and privileged pre-mediation statement to the mediator. Several helpful sections show an advocate’s active use of the mediator’s power and role, including chapters on requesting an evaluation, letting the mediator counsel a client, asking the mediator to deliver bad news, and dealing with end-game bargaining. For example, the video for chapter 14 shows the plaintiff’s counsel seeking an evaluation from the mediator to support his client’s view of the value of the case; the mediator is able to forestall being pushed into an evaluative posture too early in the case. In the same video chapter, the plaintiff’s counsel demonstrates a better approach by seeking advice from, not pressuring, the mediator.

Breaking impasse is always a subject on which even advocates skilled in mediation can use advice. Golann recommends the advocate consider using a “what if” strategy of simultaneous steps or linked moves, sometimes referred to as “brackets.” He also suggests the advocate consider asking the mediator to take each side into confidence with respect to “where each party needs to get to” but cautions against giving up the bottom line. Other suggestions include a meeting of experts only or lawyers only, meeting in an informal setting, and changing the parties’ estimate of their alternatives to break a deadlock.

The simplicity of the book, combined with the well-done DVD vignettes, makes this an easy read and a worthwhile “how to” inventory of skills and strategies. By identifying ways in which the mediator’s power can be accessed to assist the parties in negotiating and problem solving, mediators and advocates alike will make better and more conscious use of available techniques and tools. Even experienced litigators who now ply their trade more often in mediation will benefit from these practical tips.

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