BOOK REVIEW

MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS

By Dwight Golann
Aspen Law & Business, 545 pp.

*Reviewed by Joseph B. Stulberg**

For the past decade, mediating conventional legal cases filed in state or federal civil court has represented a rapidly expanding area of sustained, compensated mediation work.[1] One state alone reports that, in a single year, more than 120,000 cases were referred to mediation conferences.[2] *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* carefully describes and analyzes mediator strategies and techniques for successfully serving this clientele.[3]

The book constitutes an important contribution to the mediation literature in two distinct ways. First, using fact patterns from a wonderfully rich array of the types of commercial cases typically addressed in legal mediation,[4]

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[1] *See* John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 839-841 & n.2 (1997).

[2] *See* DISPUTE RESOLUTION CENTER, FLORIDA MEDIATION/ARBITRATION PROGRAMS: A COMPENDIUM at vi (1998).

[3] There are three stated audiences for the book: the beginning mediator, the experienced mediator, and the advocate. *See* DWIGHT GOLANN, MEDIATING LEGAL DISPUTES: EFFECTIVE STRATEGIES FOR LAWYERS AND MEDIATORS at xxvii (1996). In fact, though, only John Church's thoughtful contribution on the mediation of product liability cases addresses how an advocate should prepare for and conduct herself when representing a party in a legal mediation; the remainder of the book, quite properly, focuses on mediator techniques.

[4] A comment about the book's organization. The text consists of the following three parts: Part I describes the basic elements of the mediation process; Part II, the acknowledged core of the book, examines specific issues and strategies distinctive of mediating legal disputes; Part III, labeled "Special Problems," includes three distinct essays written by separate contributing authors that examine the use of legal mediation to resolve employment, environmental, and product liability cases. Golann is the author of the primary text, joined by Margery Aaron's important discussion on evaluation in mediation and R.A. Baruch Bush's discussion on ethics. Each of these contributions has appeared

Golann makes his discussion vibrantly relevant for the mediator by tailoring his analysis of particular intervenor strategies to the complexity of these particular controversies. Second, by so ably portraying the operating dynamics and values of legal mediation, Golann's discussion serves as a benchmark for both assessing the strengths and limitations of this form of third-party intervention and analyzing its family resemblance with mediation as practiced in other contexts. The comments below examine Golann's account from these two perspectives.

I. LEGAL MEDIATION

The litigation framework establishes the distinctive elements of the disputing environment for Golann's intervenor and, consequently, defines the mediator's challenges and obligations. Those fundamental features include the following: litigation has been initiated; parties are represented by counsel; the legal controversy is primarily commercial in nature;[5] issues have been defined in terms of legal causes of action; all litigants are identified; participants attend mediation under mandated legislative or court-referral procedures; the participants believe that, should mediated negotiations fail, a trial or some other third-party adjudicatory procedures will occur; and, for the paradigm case examined by Golann, one or more of the parties pays the mediator fees.[6] Golann's enterprise is to show how a private intervenor can most effectively assist participants in this environment to resolve their dispute without a trial.

Golann sets forth his basic mediation philosophy as follows: "[B]egin each case at the lowest level of intervention that seems likely to produce an agreement."[7] Translated into today's mediation jargon, he recommends that the intervenor begin in a facilitative posture with a readiness to move to an evaluative orientation. "This more active intervention could

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elsewhere and remains a valuable discussion. While the attempt to create editorial continuity and consistency across these various writings does not fully succeed, there is sufficient commonality among most to warrant attributing positions *tout court* as belonging to Golann.

[5] While Golann identifies matrimonial or environmental disputes as falling within the range of the "legal disputes" subject to mediation, it is clear throughout the text that the primary case—the "bread and butter fact pattern" for which legal mediation is most extensively used—is a typical dyadic controversy involving a conventional tort or contract claim.

[6] *See* GOLANN, *supra* note 3, § 4.6, at 102–122. These sections contain standard administrative forms for initiating mediation used by leading dispute resolution agencies and attends to these cited features.

[7] *Id.* § 1.1.1, at 18.

include . . . taking over lines of communication, confronting disruptive individuals, and proposing terms of settlement."[8] He then succinctly describes the mediator's challenge: first, identify what obstacles have prevented parties from settling this case themselves; second, develop intervenor strategies calculated to overcome those barriers.[9] Fortunately, he moves beyond that level of generality. He notes that all obstacles to settlement can be categorized as one of three types: (1) process obstacles; (2) psychological obstacles; or (3) merit-based obstacles.[10] While a dispute may exhibit some or all of these obstacles, there exist multiple mediator tactics for piercing each type, and the core chapters of the book are devoted to identifying and discussing them.

Viewing legal disputes as consisting of a maximum of three categories of obstacles is a helpful map for practicing mediators. It enables a mediator to target her analysis and activity. While it is not possible here to catalogue the multiple strategies and tactics for addressing each obstacle that Golann identifies and discusses (including, importantly, an analysis of their limitations), the following examples are representative.

A. *Process Obstacles*

Process obstacles are those which expose the absence of one or more parties' seriousness about participating in settlement discussions. The "offending conduct" comes in multiple forms: lawyers tell the mediator that it is useless to schedule a mediation because settlement discussions for a particular case will be a waste of time; representatives appear at mediation with limited settlement authority; or one advocate engages in bargaining tactics that offend the other participants, who thereupon threaten to terminate their participation in mediation.[11] For each challenge, Golann offers helpful insights to help the intervenor devise process dynamics calculated to thwart the barrier. To create incentives for advocates to treat mediated discussions seriously, the intervenor should aggressively use the mediation conference as a "settlement event" by creating a "ceremonial beginning" to distinguish this settlement effort from the parties' previous (and unsuccessful) effort; increasing the discussion's intensity by working through such "natural breaks"

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[8] *Id.*; *see also* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOTIATION L. REV. 7 (1996) (setting forth the grid in which mediator orientations are mapped along one dimension on their facilitative or evaluative posture).

[9] *See* GOLANN, *supra* note 3, § 6.0, at 153.

[10] *See id.* § 6.0, at 154.

[11] *See generally id.* §§ 6.0–6.8, at 154–185.

as meals or rest periods; or piercing dilatory tactics by referencing such costs as the expiration of a judge's discovery stand-still order.[12] Each such mediator tactic is calculated to manage the process to enhance settlement probabilities.

B. *Psychological Obstacles*

Psychological obstacles arise when one or more parties is emotionally involved with the matter, attaches symbolic or moral value to particular positions or solutions, or is "irrational" about the matter.[13] Golann again provides the mediator with a list of possible responses for each challenge arising within this category. To the party who has "personalized" the lawsuit, Golann instructs the mediator to identify the emotional issue, permit venting, trace the issue to its source, or "untangle" the party's emotional infusion to this lawsuit by distinguishing past circumstances which generated the feelings from the current controversy under review.[14] For persons who have irrational attachments to particular positions stemming from what psychologists describe as frameworks of selective perception or reactive devaluation, Golann concretely suggests that the mediator use a flipchart in caucus with that person to highlight unwelcome facts or float a hypothetical settlement arrangement, the terms of which the mediator already knows are acceptable to the other party, to the resistant party.[15]

C. *Merit-Based Obstacles*

Merit-based obstacles arise when participants disagree over how the lawsuit will be adjudicated on the merits. Again, without promising uniform "success" when using the suggested techniques, Golann identifies concrete mediator strategies to pierce the "merits" obstacle. A mediator can focus on the information base and examine whether the absence of certain information accounts for the difference in the advocates' case evaluation. For a party concerned that settling one case creates either a harmful precedent or a misleading reputation for a willingness to settle all such claims (e.g., individual claims of employment discrimination), Golann suggests the deft use of confidentiality provisions and linked penalty opt-outs.[16] And when counsels' assessment of predicted court action clash, the mediator can conduct

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[12] *See id.* § 6.1, at 154–162.

[13] *See generally id.* §§ 7.0–7.4, at 187–216.

[14] *See id.* § 7.1, at 188–200.

[15] *See id.* § 7.2, at 200–210.

[16] *See id.* § 8.3, at 234–237.

a formal decision-tree analysis or provide an independent evaluation.[17] Acknowledging that these last techniques are both complex and controversial, Golann offers an extensive discussion of them; whether one is ultimately persuaded by the proffered analysis should not deter the reader from carefully reading this thoughtful defense of these moves.[18]

D. *Summary and Analysis*

There is one fundamental drawback to analyzing legal mediation as consisting of three categories of obstacles. By implication, the suggestion is that the three obstacles are of comparable weight. But for the type of mediation practice under review—mediating civil litigation—that is not accurate; clearly, the merit-based obstacle is the most significant. Although Golann does not state this, it is the merit-based barriers which give legal mediation its distinctive shape. What is at stake from the onset of the scheduled mediation is a belief by one or more litigants that they are legally entitled to win. That framework dominates the dialogue. Mediators, as Golann encourages, might urge parties to consider nonlegal interests and aspirations in settlement discussions; they might attempt to generate bargaining flexibility by blatantly suggesting that litigants put aside the legal arguments and focus instead on the business matters.[19] But in the end, everyone knows, including Golann, that the trump card in the bargaining process—i.e., the pervasive threat—is a litigant's investment in the legal process and a belief that her best course of action is to gain vindication of her rights-based claim.[20] This dimension is absent when mediation is used in other contexts, such as transactional negotiations, collective bargaining, or routine public policy disputes. In those settings, while the threatened alternatives to bargaining failure can be significant, no party can claim it is entitled to a particular outcome that a nonparty participant has authority to award them; thus, negotiating to "yes" requires a partnership in dialogue that involves more than simply amending or deleting particular advocate strategies otherwise suitable to litigation.

No one should denigrate or devalue this sense of entitlement; it is clearly an essential component in the rule of law. But it is important to acknowledge and observe its pervasive impact on lawyer negotiating behaviors and the mediator values, practices, and actions, so ably described by Golann, that

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[17] *See id.* § 8.2, at 223–234.

[18] *See generally id.* §§ 11.0–11.5, at 307–334.

[19] *See id.* § 9.2, at 246–250.

[20] *See id.* § 8.4, at 238.

have developed in response to it. Golann's account—and its resulting vision of mediation—embraces and responds to those elements of the litigation framework noted above. The interesting questions arise by comparing how legal mediation, so described, answers those generic questions germane to the design of mediation systems and practices.

II. FUNDAMENTAL DESIGN QUESTIONS AND THE LEGAL MEDIATION PARADIGM

When designing any mediation process, one provides answers to multiple questions. Legal mediation is no exception. Three such questions are illustrative: (1) who is qualified to mediate?; (2) who controls the process?; and (3) what value constraints, if any, shape the mediator's posture of intervention? Golann's account of legal mediation offers interesting responses to each question that should both inform and provoke professional debate.

Golann does not want to restrict the pool of qualified mediators to lawyers. He suggests that persons with other types of training and experience can be credible intervenors;[21] for example, family therapists ably serve as mediators in matrimonial actions and experienced businesspeople are helpful in various commercial controversies. But, in this writer's judgment, Golann's account of the various techniques—compellingly reinforced by Carmin Reiss's sparkling, incisive discussion of mediating environmental contamination disputes[22]—speaks much more resoundingly for the need for the intervenor to be versed in both the substantive and practice dimensions of law. In short, a mediator needs to be a lawyer both to understand the complexities of the milieu in which she operates and to elicit the confidence of advocates with whom she is interacting. This, of course, has serious and controversial implications for states developing rules governing mediator qualifications. While many persons are concerned that restricting mediator qualifications for legal mediation only to law-trained individuals unnecessarily and arbitrarily restricts access to this growing area of compensated professional activity,[23] these proponents must address the obvious need for expertise that Golann's account so powerfully illuminates.

But this dimension of mediator qualifications connects to a more troubling aspect of legal mediation that is revealed by examining who the primary

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[21] *See id.* § 1.1, at 14–17.

[22] *See id.* §§ 16.0–16.6, at 467–509.

[23] *See, e.g.*, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, ENSURING COMPETENCE AND QUALITY IN DISPUTE RESOLUTION PRACTICE: REPORT NO. 2 OF THE SPIDR COMMISSION ON QUALIFICATIONS 11 (1995).

participants in the process are and, more broadly, who controls it. An analogy highlights the concern. When a person seeks assistance from a medical doctor to treat an illness, she expects the practitioner to operate within some defined conventions; the practitioner conducts an assessment pursuant to an established framework of analysis rather than presuming that the method of examination is a "tabula rosa" environment. But the legal mediator portrayed by Golann appears not to be as confident about what she has to offer. Protocols that define the intervenor's role are negotiable because they are (properly, Golann believes) subject to market forces; the intervenor must present her product in light of marketplace demands.[24] Golann's discussion regarding protocols for premediation information exchanges exemplifies this point. What information, if any, should a mediator collect before the formal mediation session begins? Golann notes the range of possibilities along two dimensions: substance and distribution. For acquiring substantive information at a prehearing stage, a mediator has the following options: no advance submissions; obtain copies of existing pleadings and other documents; or receive documents customized for mediation that highlight areas of concern and possible negotiating issues.[25] The options for distributing this information include the following: representatives can submit documents to a mediator exclusively; submit them to a mediator with a simultaneous exchange among themselves; or individually submit documents to the mediator on a confidential basis.[26] Golann concludes, by silence, that among these alternatives and options, there is no "best practice" model to deploy.[27]

Although this is only a small segment of the legal mediation process, it is remarkably revealing about its values and vision. First, it is clear that the participants to this interaction are not the litigants but their legal representatives; the client has virtually no say in the development of this procedural aspect of the hearing. This is justifiably disheartening to those mediation proponents who view active participation by persons whose dispute it is as an integral process value; the sense of ownership by parties in the legal mediation portrayed by Golann is not discernibly different from their role in traditional litigation. Second, the option of using "customized" documents for a premediation exchange—i.e., documents that require advocates to think through and prepare bargaining strategies—is viewed by Golann as an option but not a requirement. Indeed, small cases—i.e., low dollar value claims—"will not support customized submissions . . . . [In such instances] it is

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[24] *See* GOLANN, *supra* note 3, § 1.1.6, at 25–26.

[25] *See id.* § 5.2.3, at 144–145.

[26] *See id.*

[27] *See id.* § 5.2.3, at 144–146.

feasible to work on the basis of stock pleadings."[28] So the mediator forfeits an opportunity to place the mediated conversation in a framework that is not redundant of the legal cause of action. The picture of legal mediation that quickly emerges is that legal advocates dominate the dialogue and litigation papers define the controversy. It is not difficult to understand how the slippery slope quickly accelerates to having advocates demand[29] that the mediator offer her evaluation of the legal merits of the lawsuit as the signal contribution she can make to piercing impasse.

And that feature of legal mediation, in which the intervenor, in certain circumstances, offers her evaluation of the legal merits of the case, is what sparks the most controversy about practice in this area. The governing view of the mediation process that preceded the expansive use of legal mediation was rooted in the paradigm of mediating collective bargaining impasses and was enriched through its adaptation and application to resolving social conflicts that erupted during the 1960s and 1970s.[30] In this view, the defining feature of the mediator's role is that she be neutral regarding settlement terms; if negotiating parties find acceptable what the mediator believes to be short-sighted or not required by law, party preferences should be decisive.[31] This view continues to dominate the aspirational vision of mediation in resolving a broad range of controversies, from neighborhood disputes and marital dissolutions to disputes arising during the course of a construction project.[32]

Practitioners of legal mediation, however, argue that different dynamics operate in their practice milieu and warrant refining that mediator obligation. They urge that entrenched adversaries signal a willingness to become flexible

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[28] *Id.* § 5.2.3, at 145.

[29] Or, more charitably stated, strongly request on pain of not using the mediator in future cases if she does not accede.

[30] For standard accounts of social policy and labor mediation, see generally WALTER A. MAGGIOLO, TECHNIQUES OF MEDIATION IN LABOR DISPUTES (1971); ROUNDTABLE JUSTICE, CASE STUDIES IN CONFLICT RESOLUTION: REPORTS TO THE FORD FOUNDATION (Robert B. Goldmann ed., 1980). A general description of the recent history of the ADR movement can be found in STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 6-9 (2d ed. 1992).

[31] *See* NANCY H. ROGERS & CRAIG A. MCEWEN, 1 MEDIATION: LAW, POLICY & PRACTICE § 4:02 (2d ed. 1994).

[32] For representative accounts of the mediation process articulating these features, see ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994); JOHN M. HAYNES, DIVORCE MEDIATION: A PRACTICAL GUIDE FOR THERAPISTS AND COUNSELORS (1981); DANIEL MCGILLIS & JOAN MULLEN, NEIGHBORHOOD JUSTICE CENTERS: AN ANALYSIS OF POTENTIAL MODELS (1977); CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (1986).

in considering settlement options only after gaining the neutral's appraisal of their probable success at trial.[33] Golann's discussion and defense of evaluative mediation will not end the debate, but he provides a thoughtful, nonrhetorical account of its use. There are, however, two striking features about evaluative mediation. First, in emphasis alone, Golann devotes more coverage and analysis to this form of mediator technique than any other. The positive aspect of such extended treatment is that it is a de facto recognition of the need to try to align this practice analytically with other values constitutive of the mediation process. Its drawback is that such heavy emphasis sends a decidedly mixed message to the legal mediator: provide evaluations only as a last resort; at the same time, expect (given the dominance of the discussion) to use evaluations in every mediation conference you conduct.

But Golann's focused discussion of mediator evaluation camouflages the consistent evaluative orientation embraced elsewhere in the text and viewed as integral to the mediator's role. At different points in discussing process control, for example, Golann quietly but confidently notes that a legal mediator's role involves insuring one party that any concession its makes will be reciprocated by the other,[34] suggesting moves to one party that the mediator believes the other side will accept,[35] or reassuring parties of their counterpart's good faith.[36] This writer believes that it is possible, in a carefully focused analysis, to defend each of these mediator moves as being consistent with neutrality obligations; the danger, however, is a practical one. These moves, when taken individually and cumulatively and then placed in the litigation framework with its distinctive elements, generate a picture of a legal mediation process which poignantly deflates the aspirational vision of mediation. That aspirational vision, frequently captured in statutory language and court rules, charges parties to serious, controversial issues to take active responsibility for participation in their resolution. It structures party participation and legal representation to work in concert to hold people accountable for their conduct and to explore aggressively options for pragmatically resolving concrete demands. The mediator, through targeted procedural guidelines, grounds that spirited discussion with a pervasive dignity; she structures information development and analysis to insure enhanced participant understanding of one another's perspective; and she triggers proposal development and exchanges with informed insights about operative constraints on settlement options. The result is an energized

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[33] *See, e.g.*, GOLANN, *supra* note 3, § 10.3.1, at 272-274.

[34] *See id.* § 6.1, at 155.

[35] *See id.* § 6.2, at 167.

[36] *See id.*

discussion, deftly conducted, in which resolution occurs, if at all, at multiple levels of understanding. In other mediation contexts noted above, this aspiration is more powerfully realized than what one can expect to emerge in legal mediation.

One can, of course, legitimately query why it is a criticism of legal mediation to charge that it might fall short of realizing this vision. After all, different needs and environments warrant different responses. But that retort is disingenuous. All mediation practitioners wrap themselves in the articulated values of the process: party participation; active exploration of issues and resolutions that are responsive to client interests and needs; reduced positional posturing; and resource efficiency.[37]

Recent empirical data, however, send warning signals about how the practice of legal mediation fares on those dimensions: while user satisfaction with legal mediation overall appears strong, parties rated mediation as less fair than did their respective attorneys; individual parties, as contrasted with individuals representing business entities, were less satisfied with mediation than were other participants;[38] and when mediators recommended a particular settlement (as distinguished from offering an evaluation), parties "were less likely to see the mediation process as fair and the mediator as neutral."[39] Thus, these findings hint that while case disposition regularly occurs through legal mediation, the reasons may have less to do with such process values as party participation and imaginative problem-solving than with the coercive influence of third-party case evaluation and bargaining brinkmanship.

This should give us pause, for if the goal is to enrich our justice system by providing citizens with meaningful options and complements to adjudicatory problem-solving processes, then lawyers can, and should be expected, to use their considerable skills and imagination to design and practice legal mediation to advance that goal in the most robust fashion possible. There is no reason to expect or accept less.

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[37] *See id.* § 1.1, at 14–26.

[38] *See* ROSELLE L. WISSLER, SUPREME COURT OF OHIO COMMITTEE ON DISPUTE RESOLUTION, EVALUATION OF SETTLEMENT WEEK MEDIATION 36 (1997).

[39] *Id.* at 39.