By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

Happy 10th Birthday, Mediation in the Maryland Courts under Title 17

The Maryland Court of Appeals Rules governing Alternative Dispute Resolution and more specifically, mediation, Title 17 et seq., (hereinafter "Title 17") dramatically changed the face of litigation for businesses and other entities. Adopted ten years ago, the Rules set forth the standards for mediation and shortly thereafter, Chief Judge Bell put in motion an unprecedented request that all 24 circuit courts put in place the option and availability of mediation for all civil matters on the docket. For the most part the standards of Title 17 today, with modifications, echoes the principles of the national and international ethical guidelines for mediators in the Model Standards of Conduct for Mediators (hereinafter "the Standards") promulgated by the ACR/ABA/AAA in the revised August 2005 version. What is most noteworthy for both Title 17 and the national Standards is that they reflect the shaping impact that the transformative approach for mediation has had in the conflict resolution and alternative dispute resolution fields and on the ethics of mediator practice. A transformative approach is one that is based on a relational theory of practice and which focused on assisting people in conflict or negotiations in removing the barriers so they can more fully consider the interests and needs presented by the other parties and have their own viewpoints and needs more fully considered as well, both of which pave the way to more fully informed decision making and to lasting agreements when agreement was the parties goal. Title 17 pertaining to mediation has been revised a few times over the years since its inception in 1998, and as of 2002 had begun to embrace a transformative approach in its defining language that governs mediation in Maryland.

Technically, while Title 17 only applies to court referred mediation, common practice in Maryland has seen the rule applied by courts generally in District Court matters and in non court referred yet still litigated matters, as well as matters involving counsel but not in litigation as is the case with many business and employment transactions.

To more fully understand the leadership role the Maryland Courts have taken with regard to mediation practice in the state over the last 10 years, let's take a closer look at the actual language of Title 17, which defines "Mediation."

"'Mediation' means a process in which…

1. "…the parties work with one or more impartial mediators…":

This means being neutral and appearing neutral. It is the first thing the court mentions. Why is neutrality necessary if by definition the mediator is not to be fact finding or making decisions or even recommendations? Because a partial mediator can influence, and even pressure a party(ies) to agree to something the mediator believes is fair or appropriate that a party(ies) may not want to do. Parties need to feel relaxed and safe and comfortable so they can think clearly, speak openly, listen to and understand the other party and discern and consider what is being said and offered by the other parties and decide how and if they will make agreements. Title 17 is strident in its language to ensure this type of neutrality, which is also embraced by a transformative philosophy.

Being impartial also includes not having a conflict of interest or having a stake in the outcome. Thus, while mediators may use their skills in many arenas outside of mediation, when they are mediating, it is with a capital M: Mediating with an ethical duty to be impartial.

2. "…who, without providing legal advice…"

This language is intended to preserve a mediator's neutrality. Implicit in neutrality is not giving legal advice. Title 17 also intends to make clear that mediation is not the practice of law. If lawyer mediators steer clear of giving legal advice, they cannot be blamed for unethical conflicts of interests. If non-lawyer mediators as well steer clear of giving legal advice, they cannot be blamed for the unauthorized practice of law.

The Standards expand this language to prohibit a mediator from providing any professional advice. The Standards also however draw the distinction that a mediator may provide information that he or she is qualified by training or experience to provide, if the parties so request such information, and only if the mediator can do consistent with the Standards, such as mediator neutrality and impartiality.

Title 17 and the Standards are clear in preserving the ethical concept of party Self-Determination and have drafted language for what a mediator is to do and not to do to ensure that the parties are able to decide, including decisions to escape confining restrictions of the law and legal remedies and to explore instead other options that will work for them.

3. "assist the parties in reaching their own voluntary agreement for the resolution of the dispute or issues in the dispute."

Agreement must be the creation of the parties free from the influence of the mediator, again language to ensure parties Self-Determination and the mediator's proper role, which again also encompasses a transformative approach. Mediators must resist the temptation to insert their own agenda and what they believe is fair or best. No agreement is voluntary if a party is coaxed into, manipulated, or forced, or scared into the terms.

4. "A mediator may identify issues and options,…"

Title 17 does not say a mediator should "suggest" issues and options. It is clear to say the mediator may "identify" those issues and options, in other words, those that are in the parties' negotiations, conversations and context already, rather than created from the mediator's analysis. The Court recognizes that a mediator cannot know what concerns the parties nor what will best deal with that concern. When a mediator assists in creating a relaxed, safe environment for the parties, this encourages the parties to speak, and from their own interactions and talk, issues and options emerge. It is these issues and options that the mediator may identify. Skillful transformative mediators will regularly identify such issues and options for the parties, including ones that may appear to the mediator as irrelevant to the lawsuit or presenting dispute but may be important to the parties by virtue of their raising them and speaking about them.

5. "…assist the parties or their attorneys in exploring the needs underlying their respective positions..."

Title 17 is set in the litigation context. It assumes parties and counsel will be engaged in positional bargaining negotiation. Title 17 embraces the problem-solving, win-win approach in this language, and sets forth that a mediator's job is to assist in helping parties to explore their underlying needs. A transformative approach is to honor this job by expanding the method for doing so. It is helpful to discuss candidly and impartially with the parties and their attorneys the basis and practicality of their respective positions and then to offer them the opportunity to discuss such positions with each other. A transformative mediator's focus will then be to assist in removing the barriers in the interaction of the parties so as to assist them with exploring their underlying needs if so chosen.

6. "..and, upon request, record points of agreement reached by the parties."

Title 17 embraces that mediators are often scriveners for drafting agreements as well as the expanded role of recording "points of agreement" which may include terms of agreement or may include idea summaries or points of agreement about process, again an expanded view of the outcomes of mediation, beyond mere settlement. A transformative relational framework promotes this expanded view and role of the mediator. This has greatly expanded the use of mediation for many business negotiations and disputes as well.

7. "While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement."

This language is a sea change from earlier versions of mediation, specifically evaluative mediation, or what may be referred to as settlement conferences. Now not only do "the parties know best", with the Maryland Courts leading the way in this approach through the choice of language of Title 17, but also the drafters of Title 17 took the bold move of distinguishing mediation from a settlement conference or a neutral case evaluation. Mediation is neither. Nor should it be either. Each process is unique and separate and distinct from the others. Mediation is guided by a specific set of ethical standards, however. The others are not.

Happy Tenth Year Anniversary, Title 17! You've Come a Long Way, Baby

Over the years as the language of Title 17 has been amended, it is helpful to note what has been taken out of the prior versions of Title 17, for instance the removal in 2001 of "to help parties reach agreement" since that is no longer the assumed goal for the mediator until parties desire this themselves, voluntarily. Also in that same year, the Rules Committee responded to concerns that the role of the mediator was widely misunderstood and that the original language of 1998 unfortunately was only helping to perpetuate what was either purposeful or unwitting abuse of the mediation process by some mediators as they became mere agreement brokers and used many bullying or deceptive tactics all in service of getting people to agree, many such tactics which are now considered unethical or bad practice under Title 17 and the Standards. Today Title 17 is clear in setting forth that the mediator does not recommend terms of agreement and tell parties what to do. Although this "new" language is almost seven years old, it is still "new" for many judges and lawyers with a litigation background. While this standard may be difficult to live by for many attorney mediators who are used to judging, analyzing, evaluating, advising, and questioning, it was necessary to breathe life into the ethical concept of party Self-Determination and to set mediation apart from other methods of Alternative Dispute Resolution.

Over the years the Rules Committee has listened and heard the voices of consumers and mediator practitioners, and will continue to do so as the field and practice continue to develop and evolve. And as it has over the last ten years, the Maryland Judiciary will continue to lead the way in providing a better process for a better outcome.

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