Louise Phipps Senft

# Turning problems into opportunities

## MEDIATION RELUCTANCE

Some parties and attorneys are reluctant to voluntarily enter into mediation. There are a number of reasons for this and this article will discuss some of them.

One reason I've encountered is that, if one party suggests mediation, the other party may think it must be a bad idea. Remember trust between parties is an early casualty of a conflict. Sometimes mediators will offer to reluctant parties an invitation to come in for an informal, confidential, one on one meeting, also known as a caucus, to meet the mediator and discuss what the process is and isn't and how the mediator could be most helpful. If the parties can't trust each other, they may be able to trust the mediator and the process the mediator offers, that of quality dialogue opportunities and informed decision making, that may address their reservations about going to mediation.

I have also experienced a corollary to the first reason for reluctance to try mediation, and that is fear of a mediator. And for good, albeit unfortunate, reasons as I will discuss. "Will the mediator put pressure on me to settle?" "What if the mediator makes me agree to something I don't want?" It is not only unfortunate, but it is against Standards of Professional Conduct for Mediators, that many mediators have indeed placed pressure on parties to settle and to settle for terms that they do not agree with, all for the goal of getting an agreement. This is not what mediators should be doing. Under Maryland Rule 17.102(d), a mediator should not provide legal *advice* nor *recommend* the terms of a settlement. Experienced and highly trained mediators realize that putting pressure on parties to settle on particular terms, or even to settle at all, is not only contrary to court rules and to professional standards of ethical conduct, but as importantly doing so is counterproductive.

Settlements happen when the parties are relaxed and free from pressure. Settlements happen when the nitty-gritty can be discussed candidly without pressure from a mediator or without cleverness on the mediator's part to fabricate agreement when there is none. Settlements occur on genuine terms when parties flesh through and understand more thoroughly the barriers and differences as well as the commonalities on which they can probe and explore possibilities for sturdy and enduring terms of resolution. No one wants to make a decision under pressure. Many bad decisions are made this way. It is the mediator's job to reduce this pressure by providing an oasis for clear thinking, not to increase the pressure. When pressured, people resist or buckle. It's a natural human response; either approach leads to terms that fall apart.

People sometimes don't understand also that they don't have to make a decision or a final decision at the mediation. They are free to leave the mediation with things to think about and consider and then make a decision. Mediation is not a court trial where there

has to be a decision then and there. Of course, I have experienced many mediations when parties freely make final decisions at a first meeting because they had the opportunity to, with the mediator's assistance, flesh through the difficult issues and come to genuine terms of resolution.

There is fear of the unknown. "Why change what has worked for me before?" The next time you are sitting on the beach at Ocean City, reflect on the time, expense and delays that are often involved in usual settlement discussions. Maybe something will work for you better. You won't know if there is a better procedure than you have been using until you try it. Attorneys who have had experience with mediation often become mediation boosters.

Some attorneys worry about mediation being a "free discovery" exercise. This worry can be over exaggerated given the liberal discovery rules. What sometimes happens is that information helpful to both sides, and definitely helpful to settlement, emerges in a mediation. The adages of "don't volunteer information" and "just answer the question" usually block helpful information that may come forth at trial to some party's dismay. Nothing is more helpful to settlement than full information. A lack of information makes settlement difficult. People feel more confident about a settlement when they don't feel uncertain about the facts. The beauty of mediation is the confidentiality of the process, by court rules and rules of evidence.

What will my client think if I have to invite a third party in to settle the case? You can always blame the other side as being intractable. My experience is that parties reaching a satisfactory settlement in mediation think highly of counsel for recommending it. They see it as a welcome alternative to an expensive and uncertain trial. Parties are looking to their counsel's approval of the process and are relieved that counsel gave them the wisdom and support for entering into a mediation process. Even where settlement is not reached parties seem to believe that it was worth the effort since parties in conflict, even grudge holders, deep down want to settle or resolve the conflict. It's the litigation itself, and oftimes the perception of counsel that has prevented the matter from resolving on genuine practical terms. What parties often highly appreciate is the opportunity to be involved in the settlement process and being heard, an opportunity they don't have when settlement discussions do not involve them. Being a co-architect of the resolution of their conflict makes the parties think more highly of the legal process and of their counsel.

"It will just be a waste of time. The other side will never settle" In some cases, mediation is the <u>only</u> way parties will settle. People sometimes come into mediation and say "I'm here but we will never settle this." My response is "You may be right. Want to give it a try and see what happens?" I can't tell you how many times parties have reached settlement to their great surprise, a pleasant one at that. Parties believe they won't settle because all their previous settlement efforts have been unsuccessful and that is what they are thinking about. The presence of a third party neutral who intervenes to assist with the quality of the deliberations often helps change the otherwise negative dynamic. And so, parties address their conflict differently in mediation than they had previously and reach the success that had alluded them.

My advice to parties and attorneys having reservations about mediation is that

there is little to lose and much to gain. There is not that much time, effort or expense in mediation that can be lost. Confidentiality rules protect against inadvertent misstatements and a case settled or resolved is a case successfully handled. The practice of law is zealous advocacy; going to trial is not the only help that should be offered. Indeed, it should often be the last help. Zealously supporting full discussions in a mediation process could be a saving grace not only for clients and their relationships with their counsel, but for counsel as well. Mediation: Better Process…Better Outcome.

*Louise Phipps Senft is founder of Louise Phipps Senft & Associates/Baltimore Mediation which specializes in mediation, facilitation and training in conflict transformation skills. She was voted "Baltimore's Best" Mediator 2003. For questions and comments, she can be reached at 443-524-0833 or www.BaltimoreMediation.com.*