By Louise Phipps Senft

The negotiating table

Turning problems into opportunities

May 2005

Mediation: Significantly Different from a Settlement Conference

The Maryland Court of Appeals Rules govern mediation in court-referred matters. I would like to comment on and supplement the information provided in Rule 17 by suggesting the philosophy and purpose underlying the Rule.

The Court of Appeals has determined, correctly in my view, that unless the mediation process is significantly different from the usual settlement procedures undertaken by attorneys in a case, why have it? And so the Rules give an expanded role in mediation to the parties in a case, the clients, and a diminished role to counsel and to the mediator. The Rules explicitly state that mediation is not a settlement conference.

Mediation is intended for the parties, not just for their lawyers; why else would the Rules provide that parties must be present? Mediation is also intended to be a face to face experience; why else would the state's circuit court mediation programs require that parties be present in person? These in and of themselves are distinctively different aspects of a process from a settlement conference. Furthermore, parties are presumed to be able to engage effectively in a mediated conversation or negotiation given the proper setting. The court's Rules specifically state that mediators are not to be evaluating cases and providing legal advice. Without the providing of legal evaluation and advice by the mediator, the parties are freer to explore other bases for resolving their conflict. They can look at what might serve their needs and interests without being confined by legal parameters. They can look at what makes the interaction itself so difficult. They can experience a more meaningful, more positive interaction without being constrained by what would, by other legal standards, be considered weak or irrelevant. This is widely different than a settlement conference. And the court provides parties at least two (2) hours, or more if chosen by the parties, in which to have this mediated conversation, far different than the 10-30 minutes allotted for a settlement conference.

In mediation, if a suggested settlement proposal by one or both or all of the parties seems fair and seems to address adequately the problem and the concerns of the parties, it can become a satisfactory basis for a settlement even if, had the case gone to trial, other results might have been ordered by the court. Legal remedies can often be limited or restrictive. While the law or legal remedies may or may not be factors to consider in a mediation, it is the parties who will weigh their significance to their situation. Parties in mediation may also go much further than the

law would in remedying a wrong, or may shape a remedy far more meaningful than a remedy fashioned in a courtroom, or a settlement conference.

When parties in mediation realize that the mediator is not going to resolve the matter for them, even by way of recommendation, they both feel released to explore a wide range of do-able options and also recognize that the matter is in their personal control . This is so even though proposed settlements are often discussed with counsel prior to becoming final.

For lawyers serving as court appointed mediators, the process requires adjustment. Lawyers give advice and make recommendations as part of their regular professional routine. For attorney mediators, they must bite their tongue even when, *to them,* a certain settlement scheme seems absolutely perfect. To be sure, if parties reach rigid impasse, various process observations might be made by the mediator about various alternative process considerations. Any such observation or suggestion, however, is only made provisionally, without pressure or endorsement. The decision making process must always remain in the hands of the parties, and any terms of agreement must be totally their own. Parties can, and do, honor agreements that they personally architect. Research of mediated settlements supports this.

And for attorney mediators, previously schooled in putting a person on the stand and, with their questions, taking the party where they want the party to go, the changeover to inviting the parties to go where the parties want to go, and following them, can be difficult to master.

Yes, as lawyers, mediating in a manner consistent with the philosophy now reflected in the Rules, it may be difficult to stay true to the mediation ethical standard, adopted by the Rules, of party self-determination. Seeing the realized potential of mediation, however, which stems from the very differences in this form of ADR over a settlement conference, attorneys and parties can view mediation as a complement to the usual settlement efforts made by counsel. When mediation is conducted according to the ethical guidelines of party self-determination and conducted in the spirit in which the Court of Appeals intended for the process to be significantly different from a settlement conference, the experience is usually very satisfying to parties. The primary reason for this is that, with or without settlement, the parties are free to talk and explore whatever they so choose, to ask questions, to hear new information, to see a wider picture of a situation and have an opportunity for quality deliberation. For those parties who may not be satisfied with the process, they might reflect on whether or not their court ordered mediator offered them a process that was significantly different from a settlement conference, as intended by the Court of Appeals.