Neutrals

By Rejecting Evaluation, Maryland's New Mediator Standards Present Significant Practice Issues for Commercial Cases

BY JEFF TRUEMAN

The Maryland Court of Appeals adopted new standards of conduct for court-appointed and non-court-appointed mediators, effective Jan. 1, 2020. Although the new practice standards are the same for both groups, different links appear on the Maryland Judiciary's website: for court-designated mediators at http://bit.ly/2FCBIY9, and for non-court appointed mediators at http://bit.ly/2tMLeVV.

While the new standards reconcile and consolidate two different sets of practice standards that applied to mediations inside and outside of court programs, a few significant issues remain unaddressed and unclear, rendering some provisions impractical and unworkable in commercial mediation—especially injury cases.

Notably, many commercial mediation practitioners in Maryland do not support the new standards.

As a result, there is a continuing power struggle over the legitimacy of evaluative process and self-determination in mediations and settlement conferences under the new Maryland standards.

Under the Maryland rules, mediators in court-referred cases are not supposed to offer legal advice or recommend proposed settlement terms. See Md. Rule 17-102(g) ("'Mediation' means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of all or part of a dispute."), and Md. Rule 17-103 ("While acting as a mediator, the mediator does not engage in any other ADR process and does not recommend the terms of an agreement.")

Settlement conference practitioners, however, have no such restrictions. See Md. Rule 17-102(l) ("'Settlement conference' means a conference at which the parties, their attorneys, or both appear before an impartial individual to discuss the issues and positions of the parties in an attempt to agree on a resolution of all or part of the dispute by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial individual may recommend the terms of an agreement.")

The settlement conference neutrals have more leeway to employ techniques that will resolve legal disputes—a goal that most litigants uphold but relationally based mediators do not necessarily value.

The Maryland rules and the new standards do not acknowledge one of the primary reasons why many successful commercial mediators are hired: to provide an opinion about the parties' legal positions—although sentiments differ widely as to whether, when, and how mediators share evaluative opinions.

Thus, the Maryland rules make the mistake of elevating the framework preferences of some practitioners in Maryland over the larger, more universally accepted principle of party self-determination. This is true even though commercial mediation parties in the Baltimore region expect mediators to use processes that "fit with parties' [dispute resolution] objectives—for example, facilitative for

(continued on next page)

NO CONCERN FOR PRACTICAL CONCERNS

Maryland's new standards of conduct for court-appointed and non-court-appointed mediators state that "[a] mediator shall not conduct a dispute resolution process other than mediation and call it mediation." See "Quality and Integrity of the Mediation Process," in the two sets of standards cited in the accompanying article, at page 13; see also Md. Rule 17-103.

The vast majority of litigators and insurance claims professionals, mediators, and private mediation referral agencies such as Irvine, Calif.-based provider JAMS Inc. and the McCammon Group, a Richmond, Va., ADR provider (which evaluates legal positions in mediated "money" cases), do not distinguish between "mediation" and "settlement conference."

No one in the marketplace distinguishes mediation from settlement conference as articulated by the new standards or the Maryland rules—including the ever-increasing number of retired judges who reinvent themselves as "mediators" in Maryland every year, some of whom return to the bench as senior "recall" judges, collecting their full pre-retirement salary by adjudicating cases brought and defended by lawyers who may hire them as private mediators and arbitrators for substantial fees. See, e.g., Dan Clements, "With ADR, Judiciary is putting its economic interests first," *Daily Record* (Maryland) (Nov. 16, 2016) (available at http://bit.ly/3a3LBwb), and Editorial Advisory Board, "Private mediator, judge or both?" *Daily Record* (Maryland) (Nov. 23, 2015) (available at http://bit.ly/2R6Q3l2).

—By Jeff Trueman

The author is a private commercial mediator in Baltimore, and the past director of Civil ADR for the Circuit Court for Baltimore City (see www.baltimorecitycourt.org). He wrote about the topic in this article in 2017 in the Maryland State Bar Association Inc. ADR Section newsletter—see "Give the People What They Want: It's Time for 'Mediation' in Maryland to Simplify and Move Forward," 11(1) *ADReport* 5 (Winter 2017) (available at http://bit.ly/30fNjpx)—and last year at "Proposed Standards of Conduct For Mediators," *Daily Record* (Maryland) (April 9, 2019) (available at http://bit.ly/39YIuFK). He can be contacted at jt@jefftrueman.com.

Neutrals

(continued from previous page)
relationship-focused disputes or evaluative for transactional disputes[.]" See the Global Pound Conference (GPC) Baltimore report at page 13 (available at http://bit.ly/2NS1pIV).

Unfortunately, the new standards go in the opposite direction; they limit party self-determination. Parties can only decide whether to participate in mediation and whether to accept an outcome, but not what kind of process they can receive. See the descriptions of self-determination in the court-appointed and non-court-appointed mediator standards linked above in the first paragraph, at page 5 of both documents. The drafters' note acknowledges parties may "exercise their self-determination regarding the mediation process by making an informed selection of a mediator and by telling the mediator their process preferences." But "the parties do not control the mediation process."

Indeed, it is true that the mediator controls the process, but for successful mediators, nothing is "cast in stone." See Thomas J. Stipanowich, Insights on Mediator Practices and Perceptions, *Dispute Res. Magazine* 4 (Winter 2016) (available at http://bit.ly/2tMI9oY) (presenting research findings that verify flexible and diverse mediation techniques employed by members of the International Academy of Mediators).

Mediators who are in demand are hired for their expertise and effectiveness at helping the parties reach their outcome goals—usually a settled case—honed by years of experience and thousands of cases. They consider suggestions from many sources that include the participants, colleagues who have encountered similar circumstances, applicable rules and practice standards, etc.

What *do not* work are pre-determined opinions from those who are not full-time mediators and do not practice commercial mediation on a regular basis but nevertheless constituted a majority of the work group that debated Maryland's new standards.

No mediator worth his or her salt will accept or reject process choices in advance without considering how they will apply to the case at hand. I am certain that some of my mediation friends and colleagues do not agree. But they have no substantive reason why I—or any other practitioner who disagrees on this point—should be considered *unethical.* To claim otherwise assumes a degree of righteousness and anxiety that is self-oriented, not party centered.

In reality, most successful commercial mediators rely on their years of experience to blend processes that improve relationships or exchange currency or do both. Quite simply, lawyers and insurance claims professionals want commercial mediators to employ the broadest range of techniques possible to help the parties resolve the dispute. Successful, ethical mediators answer that call.

Pulling Back On Evaluation

The issue: New mediation rules run against common practices.

The target: Maryland's mediator standards restrict approaches neutrals may deploy in assisting parties in reaching a settlement.

The potential effects: The new rules, the author warns, harm confidentiality, perpetuate inefficiencies, and frustrate party expectations of self-determination.

RECALLING BAD EXPERIENCES

The new standards and the Maryland rules seem to ignore the high volume of torts and other distributive bargaining disputes filed in Maryland courts every year.

Often, litigants in these types of cases have no preexisting relationship or are not interested in rekindling what may have existed between them before litigation. Nevertheless, Maryland courts assign these cases to "mediation" as defined under the new standards and the Maryland Rules, wasting resources because most litigators in Baltimore City (and likely elsewhere in Maryland) routinely opt out of court-ordered mediation.

Too many litigators can recall bad experiences with court-appointed mediators trained in the facilitative model and instructed to avoid evaluation. (In addition, the timing of court orders to mediate also contributes to large numbers of opt outs. When courts issue orders to mediate too soon, counsel have few facts to determine whether mediation will be viable months later when discovery closes.) As a result, courts issue orders to mediate, only to issue subsequent orders permitting parties to opt out or substitute mediators—many of whom are not court appointed—who *will* provide the service sought by the parties *when* they are ready to engage in settlement negotiations.

Consequently, and ironically, the standards decrease efficient case administration and fail to assure "quality" in court ADR programs.

CONFIDENTIALITY RISKS

Mediators who fail to adhere to the new standards may jeopardize the confidentiality of mediation communications. The Maryland rules provide confidentiality protection only to court-ordered mediations. Md. Rule 17-101(a) and 17-105.

A different statute, the Maryland Confidentiality Act—see Md. Code, Courts and Judicial Proceedings, section 3-1801, et. seq., referred to here as the Confidentiality Act—protects communications made in mediations that occur outside of a court order but *only* if the mediator states *in writing* that he or she will adhere to the new standards. Id. at section 3-1802(a)(3). (The Maryland Code is available at http://bit.ly/39YbnS9.)

Although the Maryland rules of evidence make most settlement discussions inadmissible (Md. Rule 5-408(a)), one case found them inapplicable because the parties did not maintain a dispute over a claim. *Sang Ho Na v. Gillespie*, 234 Md. App. 742, 751 (2017) (available at http://bit.ly/36IGBut). Settlement discussions can also be admitted under Md. Rule 5-408(c) ("when offered for another purpose, such as proving bias or prejudice of a witness, controverting a defense of laches or limitations, establishing the existence of a 'Mary Carter' agreement, or by proving an effort to obstruct a criminal investigation or prosecution") (Full text of the rule is available at http://bit.ly/2OSPpY4).

A contractual agreement between the participants, however, can keep mediation

communications confidential. *Sang Ho Na*, 234 Md. App. at 751-52. The issues are whether practitioners, counsel, claims professionals, and parties know this and whether the contract will be enforced in court, if necessary.

Notably, settlement conferences and neutral evaluations are afforded no confidential protections under the Maryland rules or the Confidentiality Act—an unpleasant surprise for most everyone at the settlement table. This author believes that there is no good reason why the Maryland rules should not provide the same level of confidentiality protection to all forms of dispute resolution, court-ordered or otherwise.

PROCESS OPTIONS ARE RESTRICTED

Under the new standards and the Maryland rules, mediators "shall not change from mediation to any other dispute resolution process without first discussing the implications with the parties and obtaining their informed consent." See the court-appointed and non-court-appointed mediator standards linked above in the first paragraph, at page 15 of both documents.

Presumably, this provision is intended to ensure participants receive the process they want. But it assumes parties and lawyers maintain a detailed knowledge of dispute resolution techniques and frameworks.

In my experience, this is the furthest thing from the minds of mediation participants. More often and more realistically, parties and lawyers want the other side to understand their concerns and make concessions. To analogize it, I do not care how my accountant does my taxes, or how my dentist cleans my teeth, or how my auto mechanic fixes my car as long as the service leaves me better off and I am not overcharged for it.

'To analogize it, I do not care how my accountant does my taxes, or how my dentist cleans my teeth, or how my auto mechanic fixes my car as long as the service leaves me better off and I am not overcharged for it.'

As explained earlier, most litigants want to resolve their disputes. Of course, once in a while, people engage in dispute resolution processes with no intention to settle the case. But most of the time participants want to "get it done" and they want a mediator with similar sentiments and skills.

It is simply not practical or relevant to expect a mediator who wishes to direct the process in one way or another to stop mid-process in order to explain the implications. No mediator who wants to be hired again will ask for permission to do what the parties and counsel thought was going to happen in the first place.

* * *

Mediation rules and standards of practice should help litigants achieve their outcome goals—a settled court case in most instances. When mediation is flexible enough to resolve conflict, everyone wins, including the judiciary. Parties form a favorable impression of the judiciary when their case is resolved with the assistance of a capable mediator appointed by the court. Furthermore, high-volume courts administer justice and use resources more efficiently when their mediation programs resolve cases that can and should resolve.

Ethical violations do not result from differences of opinion about mediation orientations or frameworks. It is not right or wrong to practice evaluative mediation, for example, if that is what the parties want, or if it helps them communicate more meaningfully, or if it helps them reach their goals.

In my view, the opposite is true: restrictions that prohibit practitioners from listening and responding to the parties' process and outcome goals deepens conflict by projecting the practitioner's values onto the parties. It also damages the credibility and reputation of the practitioner, the mediation program, and the practice in general.

Practice flexibility is paramount to ensure the viability and relevance of mediating commercial disputes. Commercial mediation users in the Baltimore region and no doubt elsewhere expect mediators not to "use a one-size-fits-all approach, either always facilitative or always evaluative[.]" (See page 12 of the GPC Baltimore report, referenced above).

Maryland could and should do better to serve participants in tort and commercial mediations. Until it does, the private commercial mediation market will serve the needs and wants of the parties as they see fit.