YOU CAN'T ALWAYS GET WHAT YOU WANT??
HOW TO GET THE BEST RESULTS IN MEDIATION

By: Douglas J. Furlong, Esq.

Mediation is becoming more and more commonplace. In addition to the Court's embrace of mediation as an alternative way to resolve disputes, many contracts now require the parties to engage in mandatory pre-suit mediation when conflicts arise. Thus, it is not unusual for individuals and businesses, and their counsel, to at some point find themselves in a mediation, often with large sums at stake.

For twenty-two years I have been practicing civil litigation in Maryland's state and federal courts. As a practicing litigator, I have represented many of my own clients in mediations. Since 1997 my practice has also included acting as a court-appointed mediator in numerous cases referred by the circuit courts, as well as in cases where litigation counsel have hired me to act as their mediator. Wearing both hats, i.e., attorney and mediator, has provided a valuable vantage point to note what works, and what doesn't work, in mediation. Because mandatory mediation is part of the civil case scheduling order that is regularly issued by a number of Maryland circuit courts, and most cases are eventually settled rather than tried, many more cases are resolved at mediation than at trial. Nevertheless, I've seen a number of otherwise good attorneys and their clients make the mistake of treating mediation as an afterthought when, in reality, it may be their best opportunity to get the best results in their cases.

Below are some observations and tips that plaintiffs and defendants alike should keep in mind when mediating their cases:

I. <u>Understand what mediation is, and what it is not.</u>

Although mediation and arbitration are both forms of alternative dispute resolution, they are not the same. Mediation is a process in which the parties work with an impartial mediator who, without providing legal advice, facilitates discussions that assist the parties in reaching their own voluntary settlement agreement. The mediator is not acting as a judge, and does not declare a winner or a loser. No one, including the mediator, can force a party to settle a case. The case is only resolved if both parties agree that it is resolved. That said, a good mediator is not a passive facilitator. An effective mediator will identify issues and options, including providing confidential "reality checks" to make sure the parties understand the potential strengths in their opponent's case, and the possible weaknesses in their own. The mediator's constructive input hopefully has the effect of making the parties more amenable to reaching a negotiated, and therefore certain, resolution. This is very different from arbitration, where an arbitrator acts just as a judge would in a non-jury trial. The arbitrator considers the evidence presented by the parties and, based on that evidence, resolves the case in favor of one party or the other. Because the arbitrator is the sole decision maker, her opinion is the only one that matters. Contrast this to mediation, where the person who needs to be persuaded is not the mediator, but your opponent, because there is no resolution unless a

consensus is reached. The mediator, and the mediation process, is what the parties use to reach that consensus.

II. Be proactive when selecting the mediator.

Although it is true that the typical scheduling order issued by the Maryland circuit courts appoints a mediator selected by the court, the Maryland Rules make it clear that the parties can agree on a different mediator if they so choose. So, unlike a trial, where the parties do not have the option of handpicking their trial judge, in mediation the parties have the option, and indeed the right, to handpick their mediator. Not surprisingly, some mediators are better than others. Because mediation may be the best opportunity to get the lawsuit favorably resolved short of trial, the mediation session should never be wasted with a mediator who is not well suited for your case. Some due diligence is appropriate before agreeing to the selection of a particular mediator. If you are not already familiar with the proposed mediator, this due diligence can include discussing the mediator with colleagues to determine the answers to these questions:

- Does the mediator have a reputation for getting cases settled? Good mediators tend to get most of the cases they handle settled.
- Does the mediator have a reputation for being persistent? Persistence is probably the most important trait of an effective mediator.
- Does the mediator have a reputation for being well-prepared?
- Is the mediator experienced in mediating cases similar to yours?
- Does the mediator have some professional background in the area of dispute?

Due diligence may also include *ex parte* (*i.e.*, one-sided) communications with the mediator, which is completely permissible. A litigant should feel free to discuss with the mediator his or her "style" of mediation. Some mediators are more passive, and some are more active, in providing input on the relative strengths and weaknesses of each party's position. Over the years I have found that seasoned litigants, especially in business disputes, often appreciate candid reality checks behind closed doors, but they are only effective if the mediator is both qualified to provide them and is comfortable providing them.

III. Use the mediation process to your advantage.

Most business negotiations last weeks, or even months. The negotiations in a mediation session are usually compressed into one day. Nevertheless, mediation is a unique process, and smart litigants will understand this and use the process to their advantage. Here are some practical tips:

- The groundwork for a productive mediation session is laid prior to the mediation. Submit a clear, persuasive pre-mediation statement to the mediator. The statement should give the mediator the support he needs to "reality check" the other side during the mediation session. Although the parties have the right to submit confidential statements to the mediator, consider also exchanging mediation statements with your opponent prior to the mediation. It is important that your opponent understand your position, including your view of the strengths of your case and the weaknesses of their case, prior to the start of the mediation, so they can digest the information and realistically evaluate the case. If critical information is presented for the first time at a mediation, the effect is usually to paralyze the decision-maker, rather than to prompt a change in their position. "Perry Mason moments" don't work in mediation.

- Understand that the negotiation can take many steps over the course of a long day, and it can't be forced. If the parties could "cut right to it," they would have done that already. So don't expect large movement in offers and counteroffers, especially at the outset. More typically a series of small steps occurs, as both sides absorb and contemplate the input from the mediator. Several small steps can eventually be the equivalent of a large step.

- Know the settlement value of your case. It is surprising how often parties appear at mediation without a realistic understanding of the true value of their case and the costs that will be incurred if the case goes to trial. The settlement value of your case is not the same as your best-case scenario at trial. Every trial presents risks and costs. Because trial outcomes can never be predicted with absolute certainty, the settlement value of any case is a range, not a number.

- There should be a rational basis for each settlement offer or demand you make during the course of a mediation, which you should articulate to the mediator so he can articulate it to the other side. Unrealistically high demands and unrealistically low offers are counterproductive, and hurt your credibility. Do not take positions during the mediation that cannot withstand factual and legal scrutiny.

- Don't take offense at an unrealistically low initial offer, or an unrealistically high initial demand. Reward movement with movement, and see where the negotiations lead. Patience pays.

- Avoid ultimatums during the course of the mediation. Ultimatums may make you feel good, but they don't work. Always leave room to allow your opponent, and yourself, to save face.

- Personal attacks should always be avoided. Remember, you are trying to make a deal with the people across the table. Keep all discussions civil and professional.

- Most mediations will include an opportunity to speak with the mediator privately. In those private sessions, give the mediator his talking points. Remind the mediator of the strengths of your case and the weaknesses in your opponent's case, so the mediator will be prepared to discuss those points with your opponent.

- Don't be an ostrich. Some litigants have a tendency to become case-blind regarding the merits of their position, especially if the case has been hard fought. Consider the realty checks offered by your mediator. These are the same arguments your opponent is likely to make to a judge or jury if the case goes to trial. Are you able to effectively rebut each argument? If not, how have you factored these points into your settlement value calculation?

- If you hit a logjam, use your imagination to get past it. The plaintiff may be willing to take less if the money is paid now, and the defendant may be willing to pay more if he is given time. If the plaintiff still has the need of a product or service sold by the defendant, it is often easier for the defendant to contribute that product or service than to contribute cash. Sometimes the plaintiff wants an apology. A confidential settlement agreement or non-disparagement clause may be key for a defendant.

- If notwithstanding your best efforts it becomes clear that the case cannot be settled at the mediation, give some thought as to what can still be accomplished during the mediation session. You may have an opportunity to narrow the issues in the case, or agree on some other form of ADR that can result in a speedier, less expensive resolution than engaging in a full-blown trial.

IV. <u>Take care of your agreement.</u>

- Don't be a victim of buyer's remorse. If the case is settled the parties should prepare a memorandum of agreement that the parties and counsel all sign before leaving the mediation session. There should be no loose ends, and it should be definite enough to be enforceable.

- At a minimum, the signed memorandum should state the essential terms of the settlement, including the amount of any money to be paid, the date of payment, the timetable for dismissing the lawsuit, any other non-monetary relief that has been agreed to, and the identification of the party who will pay any open court costs or dismissal fees. The signed memorandum should also provide that the parties intend it be fully enforceable according to its terms, notwithstanding that a more formal agreement may be prepared.

Smart litigants treat mediation as an opportunity, not a task. Follow these steps to maximize your chances of success.

If you have any questions about mediation, please contact Douglas J. Furlong at (410) 727-8036 or dfurlong@rosenbergmartin.com. If you have any other litigation needs, you may contact Mr. Furlong or any other attorney in our litigation group:

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