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## OPINION

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### **Give the People What They Want: It's Time for "Mediation" in Maryland to Simplify and Move Forward**

By Jeff Trueman, Esq.

(The opinions expressed are those of the author only.)

**"Mediation is a facilitated negotiation with a trusted neutral."**<sup>1</sup>

This is not the definition of mediation under the Maryland Rules of Civil Procedure ("Maryland Rules" or "Title 17")<sup>2</sup>. Under the Maryland Rules, mediators are restricted from sharing their opinions about possible trial outcomes or recommending settlement terms even when asked to do so by people who are paying for the service.<sup>3</sup> If a mediator is asked to express an opinion about the terms of a proposed settlement, the "mediation" presumably stops and another process begins such as a settlement conference or neutral evaluation.<sup>4</sup> From a practical perspective, and in this author's experience, no one thinks about or handles dispute resolution this way, especially in the heat of the moment.

Title 17 should not redirect parties who are in mediation to a "settlement conference" just because they want an evaluative opinion – it is an unnecessary imposition on the information needs of the lawyers and the parties. Rather than narrow its application by pre-determining which kinds of conflict can or should be mediated, the Maryland Rules should facilitate wide use of mediation and permit the parties to get the information they want.<sup>5</sup> "Self-determination" is a bedrock principle of mediation.<sup>6</sup> Some parties want a therapeutic discussion.<sup>7</sup> Others want to bargain and strike a deal.<sup>8</sup> Quality mediators do both and good mediation process can deliver both.<sup>9</sup>

It is no exaggeration to point out that an enormous body of litigants is affected by Title 17's restrictions on deal-making mediators. Consider tort litigation. Many thousands of tort claims are filed across Maryland each year. Where there is an automobile collision, there is a tort claim. And where there is a tort claim, there is a dispute over whether someone pays money. Many Maryland circuit courts refer these disputes to court-appointed mediators who, as explained above, are not supposed to recommend terms or express opinions about possible trial outcomes. Attorneys and insurance companies hire private mediators, however, because they will evaluate, express opinions, and recommend settlement terms – all the while calling the process "mediation."

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Confusion continues to grow over what is and what is not considered mediation because other terms are used for what appears to be the same process.<sup>10</sup> The general public has no trouble understanding what doctors, accountants, and lawyers do despite innumerable distinctions they maintain within their individual professions and sub-specialties. The ADR community cannot say the same for itself, as many practitioners over-emphasize and attach themselves to particular process distinctions.<sup>11</sup> Albeit unintentionally, the ADR community in Maryland has institutionalized this confusion by creating a different, more-restricted form of mediation under Title 17 than is practiced commercially. In this author's opinion, the longer confusion persists over what is and what is not considered mediation, the longer it will take for the wider public to understand and embrace mediation as a valuable way for people to resolve their own disputes.<sup>12</sup>

### Footnotes:

1. Michael Leathes, *Stop Shoveling Smoke! Give Users a Classic Definition of Mediation*, September 2011. (<https://imimmediation.org/stop-shovelling-smoke>) (last visited Nov. 23, 2016).
2. Md. Rules 17-101, et seq.
3. Md. Rules 17-102(g) and 17-103.
4. Md. Rules 17-102(I) and (I).
5. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 12 (1996).
6. *The Md. Standards of Conduct for Mediators*, approved by the Md. Mediator Excellence Council, April 20, 2006. See also Tim Hedeem, *Ensuring Self-Determination through Mediation Readiness: Ethical Considerations*, Mediate.com (<http://www.mediate.com/articles/hedeemT1.cfm>) (last visited Nov. 23, 2016).
7. Cecilia B. Paizs, *Commentary, Mediation: What Are We Looking For?* BAR BULLETIN (Md. State Bar Association), September 2016, at 6, 20.
8. *Id.*
9. John Bickerman, *Giving Mediation Clients What They Want*, The Nat'l L. J., Nov. 16, 2009 (available at <http://www.bickerman.com/news/story/publications-1>) (last visited Nov. 23, 2016); Leonard L. Riskin, *Decisionmaking in Mediation: The Old and New Grid and the New Grid System*, 79 Notre Dame L. Rev. 1,14 (2003).
10. *Id.* Riskin, *supra*, note 5. See also Stephen K. Erickson and Marvin E. Johnson, *ADR Techniques and Procedures Flowing through Porous Boundaries: Flooding the ADR Landscape and Confusing the Public, Practical Dispute Resolution*, (Volume 5, No. 1 January 2010).
11. *Id.*
12. See Zena Zumeta, *Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation*, Mediate.com (<http://www.mediate.com/articles/zumeta.cfm>) (last visited Nov. 23, 2016).

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