Nassau Lawyer

THE JOURNAL OF THE NASSAU COUNTY BAR ASSOCIATION

April 2020 www.nassaubar.org Vol. 69, No. 8

General / OCA

The Case for Mediation Advocacy Training in the Age of Presumptive ADR

The Age of Presumptive ADR in the New York State Court System is upon us. Whispers began almost two years ago with a New York State Office of Court Administration ("OCA") Press Release in April 2018. "New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice".[1]

Flash forward to May 14, 2019, when OCA advised that it would be implementing presumptive Early Alternative Dispute Resolution for Civil Cases throughout New York State.[2] How the program would work would vary within the counties, and within the county's individual courts. What was clear, however, was that there was going to be a systemwide movement to implement presumptive ADR. The parties in a broad range of civil cases (with appropriate exceptions for cases such as those which involved domestic violence) would be directed to ADR methods, with a focus on court-sponsored mediation.

It is important to recognize that the presumptive ADR initiative does not require judicial intervention for a case referral to ADR. Rather, it is intended to act as a first step in a case proceeding to court. In accordance with the May 14, 2019 press release, implementation of presumptive ADR within the New York State Court System was scheduled to begin in September 2019.

Despite initial programs having been established last Fall, the courts are still working to implement the right procedures for the myriad types of cases that come through their doors—for the bench, the bar and the parties. During this birthing process for presumptive ADR within the state, those initial systems continue to be tweaked, providing the perfect opportunity for practitioners to offer suggestions on how to best implement presumptive ADR within their local courts, whether it be for a tort, medical malpractice, commercial, estate and trust, real estate, construction, or other dispute. The question is not whether, but how presumptive ADR will work in the various court Parts. Therefore, an understanding of the full measure and worth of mediation as a tool in an advocate's toolbox is critical, both for the practitioner and the client.

Moving Litigators into Mediation Advocacy Mode

It is an all too familiar scenario: litigators come into mediation prepared to fight. Granted, it's hard to switch that off.

Can an attorney who's lived with a case for months, sat with his/her client numerous times, prepared pleadings, written motions, conducted discovery, all focused on winning—or at least gaining as strong a position as possible—now switch that off and move into a new approach where advocacy remains important but finding the most reasonable outcome supplants crushing your adversary as the goal?

Mediation advocates at the Nassau County Bar Association ("NCBA") submit that, in order to do their best for a client, that's exactly what needs to happen. Since mediation is being pushed strongly by New York's courts some may wind up in it somewhat unwillingly. Nevertheless, attorneys remain ethically bound to seek the best outcome for their clients. That best outcome very often rests with a facilitated, negotiated settlement… just the kind of outcome mediation is designed to seek.

The Mediation Process: An Overview

At its heart, mediation is a problem-solving process. It entails recognition of the value of having a trained, experienced neutral help guide the parties through an exploration not just of their positions, but also of their underlying interests. It's also a forward-looking process, as opposed to litigation which typically looks to the past and simply seeks redress for alleged wrong. Mediation can seek creative solutions, sometimes finding redress for wrongs but also—or sometimes alternatively—looking for solutions that benefit the parties in ways they may not have considered. For example, commercial litigants go to court over a disrupted business relationship, but find their way to a framework for working together, continuing to profit in the years ahead, while also establishing an agreement for dealing with any future issues in order to avoid future costly entanglements.

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In managing the process, the mediator will guide the parties through an examination of their cases. This may seem like educating the mediator, but it's as much about forcing a careful examination by the litigants as it is about sharing information to help the mediator manage the process.

At the outset, mediators typically call each attorney to discuss expectations and the plan for next steps. Each party is asked to prepare a confidential mediation statement for the mediator's eyes only (although there are circumstances where the parties and mediator will agree to statements that can be shared). Typically, the parties are expected to confidentially explore their case's strengths and weaknesses, reasonable possibilities for settlement and available alternatives. In reality, however, all too many attorneys provide statements similar to their initial pleadings and briefs, and suggest settlement numbers in a range unlikely to sit well with the other parties. In other words, they're still in litigation mode.

Once parties gather at the mediation table, the mediator's overarching goal is to get the parties to hear each other, understand each other, explore options and find common ground. No matter the neutral's skills and experience, in the end there has to be willingness on behalf of the parties and their attorneys to seek a solution.

This has long been a challenge for mediators, with some attorneys being dedicated to the process while others remain litigators placed in a different setting. Now, however, as mediation is growing with the adoption of Presumptive Mediation by New York's courts, mediators are faced with both a challenge and an opportunity.

The challenge is working with some attorneys whose raison d'être is to fight and win. The opportunity is in showing colleagues in the law how to make the most of mediation, guiding them to a new skill set that will make them effective advocates for their clients in mediation. Steps have been taken to add training opportunities for those interested in learning how to be mediators; but far less has been done to educate litigators on how to be effective as advocates in this important part of the legal process that some will come to reluctantly.

Now is the time to grow programs, both at the county and state level, to remedy this perceived shortcoming.

Addressing the Need for Effective Mediation Advocacy Training

To move litigators, at least for the mediation setting, into a new mindset, mediation advocates must demonstrate the value of mediation to the skeptics and help guide them to a new way of thinking.

To begin with is a well-known fact: the vast majority of cases settle. A civil case that goes all the way to verdict is a rarity. Various statistics are quoted, but rarely is the overall settlement rate seen as below 90 percent. Often the average is well into the nineties. In many instances, the real question is when a case will settle, not if.

Different courts are taking different approaches to New York's Presumptive Mediation initiative, but early utilization of dispute resolution is a ubiquitous aspect of the initiative. These initial, early efforts to negotiate a settlement may be too early for fruitful outcomes. Some cases can be settled early, but others will require a certain amount of discovery before fruitful discussions can take place. Even so, these discussions help set the stage for future efforts.

When a case has matured enough for mediation to work effectively, it will be important for counsel to come to the table in a mediation-focused mindset. The question then is, what can be done in terms of focused training?

Key components of an effective mediation advocacy training program may include the following:

- Using the mediation statement to explore reasonable settlement goals and creative opportunities for settlement
- Understanding how a mediation opening differs from a trial opening
- Exploring psychological issues driving positions: what is client's underlying interests
- Setting appropriate goals
- Preparing the client for mediation
- Working with the mediator to effectively communicate opportunities for settlement

Also, mock mediation is an effective tool to enable the litigator and the client to get into a mindset to make progress during a mediation. Mock mediation is one tool that focuses on the structure of mediation. With a skilled mediator preparing them, litigators who receive advocacy training may be able to drive a more effective mediation presentation when the actual mediation occurs.

The Best Alternative to a Negotiated Agreement (BATNA)

It is critical, before entering into mediation (or any settlement negotiation) for the attorney, and his/her client to fully understand their alternatives. BATNA, a term coined by Roger Fisher and William Ury in *Getting to Yes: Negotiating Without Giving In*,[3] helps the parties identify the best they can do if the other side refuses to negotiate with them, which is often not necessarily their ideal outcome. BATNA is an example of just one of the tools available to the litigator in preparing an effective and successful mediation.

A BATNA is often defined as the most advantageous alternative a negotiating party may reach if the negotiations fail and an agreement cannot be reached. A thorough analysis and understanding of your BATNA, and what options exist, can help form the basis of whether it is in the client's best interest to concede on a point or push the other side harder.

BATNA's are not always readily apparent. Fisher and Ury outline a simple process for determining the client's BATNA: develop a list of actions one might take if no agreement is reached, convert some of the more promising ideas into practical options, and select the one that seems best.[4]

Care should be taken to ensure that the alternatives and their outcomes are accurately weighed. BATNA considerations include, without limitation: forum; anticipated composition of a jury; the judge; the other attorneys; and the credibility of the parties and other witnesses, experts, etc. Additional considerations include the potential range of both an adverse and a positive verdict; hours of trial preparation and length of trial; trial preparation costs such as discovery, experts, and attorneys' fees; and client's opportunity costs in disruption of business, life, etc. After the trial's conclusion, what is the likelihood of appeal or a retrial, with the same analysis for those proceedings? Understanding the opposing party's BATNA is often as critical as understanding that of the client.

Conclusion

Mediation is one of the key answers to easing the burden on the courts and moving the profession to a better system of resolving disputes. Better integration of mediation into the process, and more respect for it as a major component of dispute resolution are essential. Mediation advocates, be they specialists or retrained litigators, undoubtedly are part of moving things forward.

With that in mind, ADR leaders at the Nassau County Bar Association plan to focus their efforts on adding relevant training, and call on their colleagues in like positions to do the same. The time has come where mediation advocacy training must become as commonplace as mediator training, if not more so. While the profession grows the ranks of skilled mediators, it similarly needs to provide the tools for counsel to make, proper, effective use of mediation. The ADR Committee of the Nassau County Bar Association, in conjunction with its NYSBA counterpart, is currently planning several mediation advocacy training programs which will be available to all members.

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1. Press Release, New York State Unified Court System, New ADR Initiative Aims to Reduce Case Delays and Enhance Access to Justice (April 20, 2018).
2. Press Release, New York State Unified Court System, Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases (May 14, 2019).
3. Roger Fisher & Willian Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, (3rd ed. 2011).
4. Fisher & Ury, supra, n.3. at108.