Presumptive ADR in New York State

By Lee Chabin

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A man is badly hurt in an automobile accident.

A wife files for divorce to end a bitter and unhappy marriage.

Adult children battle over the validity of their father's will.

Company "X" sues company "Y" accusing it of breach of contract.

A patient alleges medical malpractice against her doctor.

What do these disparate legal matters, involving various areas of law and different types of injury, have in common? Perhaps the most obvious answer is that overwhelmingly all such cases are litigated, resulting in lengthy and expensive court battles that would leave one party (at least) dissatisfied with the outcome. Another commonality, generally most pronounced in family and matrimonial cases, is a high likelihood of strained and damaged relationships that are difficult if not impossible to repair.

But now, with the advent of Presumptive Alternative Dispute Resolution (ADR) in New York State, this will be changing. That is, civil cases, including commercial, personal injury, estate, matrimonial, surrogate court proceedings, small claims, housing and labor law cases will no longer be litigated – at least at first. These cases and others will be "presumed" to be appropriate for other methods of conflict resolution, most notably mediation. The ramifications can be expected to be widespread.

Mediation, for anyone unfamiliar, is a process where a neutral third party, the mediator, works with disputants to manage[1] or resolve the issues between them. While mediation can take different forms (for instance, in

matrimonial cases couples are usually in the same room together with the mediator throughout; but in commercial cases 'shuttle diplomacy' happens frequently), the mediator encourages parties to communicate with one another directly, helps them to gather and share information, discuss wants and needs, and develop options to meet the needs of the parties.

In New York, mediation has long been available. But the "presumption" that practically all kinds of civil cases will go to ADR here is new.

Significantly, perhaps famously, mediation endeavors to replace inefficient "positional bargaining" with the identification and negotiation over the "needs" of the parties.[2] In most definitions of mediation, and the one used here, it is the parties who make the decisions, and not the mediator. For example, in a divorce case, the wife and husband decide whether one will move out of the home, where their children will live and how to best make decisions for them. The spouses decide whether to reach agreements or not. And whether to engage in mediation at all. More on this point later.

Why is Presumptive ADR being introduced in New York? And why now? I was able to ask the Honorable George J. Silver, Deputy Chief Administrative Judge for the Courts Inside New York City, these and other ques-

tions. Judge Silver, who is responsible for implementing the new ADR Program in the New York City Courts, told me that in her 2019 State of the Judiciary Address, Chief Judge Janet DiFiore stated:

> The time is right to provide litigants and lawyers with a broader range of options to resolve disputes without the high monetary and emotional costs of conventional litigation. We consider this vision of ADR to be an integral part of the Excellence Initiative, and we are excited to work with the Bar to make it a reality.

Judge Silver added:

> The Chief Judge has directed us to provide ADR in civil cases and I am excited to carry out her vision. There is extensive data that shows that litigants who participate in ADR are more satisfied with their outcomes, as well as corresponding data that prove it is more time and cost efficient and provides better outcomes for everyone involved. This data can be accessed in the ADR Advisory Committee's Report.[3]

Professor Lela Love, Director of the Kukin Program for Conflict Resolution at the Benjamin N. Cardozo School of Law, believes that implementation of Presumptive ADR at this time is largely practical on the part of the judiciary.

> The courts are burdened by large caseloads, and mediation has been shown effective in settling cases and thereby relieving the courts. At the same time, it is difficult to get parties to volunteer for mediation. There is extensive data on the success rates of mediated cases, and I hope data will be collected in regard to new initiatives.

To be sure, New York is not the first state requiring mediation; mandatory mediation has been part of the landscape in many places, including California and Florida for many years. Even in New York, mediation has long been available. But the "presumption" that practically all kinds of civil cases will go to ADR here is new.

In addition to criminal cases, which will not be presumed appropriate for mediation, certain civil cases will fall outside the ADR umbrella, according to Judge Silver, such as ones

> involving domestic violence[4] or an order of protection; cases involving child abuse and neglect; cases involving an extreme imbalance of power; uncontested matrimonials; adoptions; or any case where the presiding judge, in his or her discretion, believes that mediation would not be effective.

Do parties realize better outcomes using ADR rather than through litigation? Often, they do, and the reason – though some litigators disagree – is due largely to the ability of participants to create their own agreements. Judges, often buried by their caseloads, generally will (and can) not explore the unique circumstances surrounding the parties before them. In mediation, the opposite is true.

In litigation, parties may rarely speak with each other directly, in court or out. Not uncommonly, litigators tell clients not to speak with their "adversaries." In mediation, direct communication is often the norm, and many neutrals encourage parties to see "the other side" as a partner to work with in solving problems, and advise clients that by helping to meet the needs of the other party, each moves closer to reaching agreements that will satisfy their own needs.

ADR, mediation included, is not a panacea, and New York State itself recognizes this fact. But the earlier parties engage in mediation, the higher the chances of reaching mutually satisfying agreements. Having parties mediate relatively early is one of the goals of presumptive ADR. In practice, this approach might mean assigning the parties a mediator (or allowing parties to agree on a mediator they want to work with them) shortly after a lawsuit is brought, rather than a year or two into litigation.

Why is mediation more likely to succeed earlier in the process? Take a bitter divorce as a stark example. To win custody, one spouse must show that s/he is the "better parent." That the other parent is "worse" or "unfit". After sometimes vicious (not to mention exaggerated or false) allegations against one another, the fear and anger of parties grow, and the chance to work together diminishes.

In mediation (again, not a cure all),[5] the mediator can work with parties from the outset to problem solve on a more collaborative track. Consider matrimonial cases, of which I am most familiar. Often (but certainly not always), it takes little prodding for parents to acknowledge that both have important contributions to make to the lives of their children. That their children need both of them. That the question to consider is not "Who will have the children?" (as if they were property), but "What decisions can we make to be the best parents possible, and to make sure that our children are well taken care of and that their needs are met?"[6]

What of cases where ADR fails? Litigation will then proceed, with little loss of time (expended in mediation) and money (paid to the mediator).

What exactly will programs look like? Different courts and parts of the state are enacting their own programs with their own rules, and so there is no one answer. In terms of the cost to parties, some programs are likely to allow for 90 minutes, let's say, of free mediation, then payment to mediators for the additional hours they work with the parties.

As noted above, a large benefit of presumptive ADR is expected to be smaller caseloads for judges, as many cases will be mediated successfully. In turn, it is hoped that regard for the judicial system will be heightened, as more

parties, having more control over their cases, and having them dealt with more quickly and less expensively, are more satisfied; and that those litigating will have fewer delays as judges will have more time for the (fewer) cases before them.

In Judge Silver's words,

> The courts will benefit with a reduction in pending cases and the public at large will benefit from a system that runs more efficiently and doesn't require them to wait four or five years for justice to be served.

Significantly,

> [L]itigants who participate in ADR express higher satisfaction levels with the outcome of their proceedings. They feel that they have meaningfully participated in the process, were heard by the court, and brought the matter to a conclusion without further emotional stress, expenditure of time, and financial costs.

Judge Silver offered:

> One of the biggest misconceptions about the ADR Program is that most of the cases will be sent to outside mediators. This is incorrect. The bulk of the program will rest on the shoulders of our very capable judges and court staff who have been ably settling and conferencing cases for decades. This initiative merely captures those settlement proceedings for what they are – ADR. Judges will continue to attempt to settle these matters, although these attempts will occur earlier in the proceedings. For instance, there is no need to go through 12 months of discovery in a motor vehicle accident where there is no question of liability and the plaintiff's injuries are not disputed. Everyone involved in this type of case knows what it is worth and so that settlement conference should happen either at the preliminary conference or very shortly after it, with no need for expensive depositions and no wasteful adjournments.

But isn't there a fundamental tension, a conflict, between essentially mandating what is – at least in the case of mediation – often considered a voluntary process? As a longtime mediator and lawyer, I think there is, and elsewhere have shared my belief that mandatory education about ADR is appropriate, but not necessarily mandatory mediation.[7] Judge Silver, not surprisingly, offered a very different view:

> There isn't a tension at all in requiring people to try some sort of ADR. Yes, they are required to try, but what they do during a settlement conference or at a mediation session is completely voluntary. We certainly can't mandate them to settle their case. But research has shown that satisfaction levels are just as high, maybe even higher, among litigants who initially did not want to mediate as it is among litigants who willingly go to mediation. Sometimes your biggest adversaries turn out to be your greatest advocates.

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Professor Love voiced a similar opinion, saying, "All that is mandatory is that [participants] listen to the opening statement of the neutral and engage in some discussion."

Given that there are studies suggesting comparable settlement rates with mandatory and voluntary mediation, a conclusion that mandatory mediation will help the courts reduce their caseloads is justified. Love noted,

> [t]he effort (of this initiative) is very much worth a try. A nudge into [trying] ADR makes a lot of sense because of the huge [financial] costs of litigation to the litigants and the cost to the courts of having took many cases. By having more people engage in ADR, the public will become better educated about it and perhaps consider ADR differently – and more thoughtfully and favorably – in the future.

Both Silver and Love acknowledged challenges to the implementation of Presumptive ADR, though their opinions differed.

"Cost" in Love's view, "is the greatest obstacle."[8] It is a "big initiative" and the "courts will need more administrators." (Administrators are being hired at this time.)

"The biggest obstacle we face," according to Silver,

> is changing the culture of the legal community, both attorneys and judges. For too long, the courts have abdicated their role of providing litigants the best opportunities to settle their cases and resolve their disputes without full-blown litigation. This has created a culture in the courts and in attorney circles where settlement, mediation, arbitration and other

> types of ADR were seen only as a recourse when your case was weak. We need to change this mentality and remember that all of us, attorneys and judges, are here to help guide people through one of the most difficult times in their lives and ADR is a legitimate tool for doing just that.

At this time, "[t]he Administrative Judges for each county have submitted their plans, which were reviewed by myself and approved by Chief Administrative Judge Larry Marks," Judge Silver told me.[9] "[W]e are currently rolling out certain parts of the plans that are ready to go."

As someone with mixed feelings about mandating mediation, do I support New York State's presumptive mediation efforts? I do. In a more ideal world, all litigators would inform potential clients about ADR in an unbiased manner, and let their clients make informed decisions about how to proceed. But many clients (and strangers, upon learning that I am a mediator) have told me their attorneys never mentioned mediation. Further, I recognize that in the "real world" parties will learn much more about mediation by being required to engage in it for an hour, let's say, than they would by participating in a class about it. Quickly, parties will be able to opt out.

What do other lawyers say about the Presumptive ADR initiatives? I reached out to lawyers on a popular listserv, and very few responded with concerns about it.

Two who did shared the following with me. Diana Mohyi, a family law attorney practicing in New York City, said, "I'm not in favor of it. I think it would make cases go on longer. Litigants need time limits imposed by courts scheduling a trial, etc."

Steven Fried, a general counsel for a number of small businesses, based in New York City, has litigated and arbitrated in federal courts around the country, though he is not currently doing so. He holds a positive view of mediation, but a generally negative one of arbitration. "I used mediation whenever possible because good mediators put the clients in charge of solving their own problems. They give litigants control over the process, or at the very least provide a fresh perspective they can't get from their own lawyers. Plus, it's cost-effective..." Fried's experiences with one organization is particular have made him wary of arbitration.

> One client [I had] was billed $12,000.00 for what amounted to a 90-minute scheduling-conference phone call with the arbitration panel (the case settled in mediation shortly thereafter). [W]e refused to pay it (we wound up settling for … $800.00). In another case, the assigned arbitrator – for whom we were paying – was[n't competent], not because we didn't like the ruling, she just [was lacking in the necessary experience] and the [arbitration organization] refused to appoint a replacement.

Fried added, however:

> In fairness to the arbitration process, I did have one arbitration with a FINRA panel that went very smoothly. We lost that case, but the process was excellent and the fees very reasonable.

In summing up his perspective, Fried said, "I have had several really bad experiences with arbitration…. I was an ADR advocate for a long time and still encourage mediation because litigation is so wasteful, but after dealing with [a particular organization] I encourage my clients to avoid arbitration like the plague."

For myself, the introduction of ADR somehow reminds me of the introduction of seat belts in automobiles. Like seat belts, one might argue that ADR will be imposed on citizens by the government. Both can be said to limit freedom of choice, though minimally. Yet each can be accepted due to the far greater good they offer, as opposed to the real, but relatively small, drawbacks. In a decade, more or less, we may well wonder how courts once did not require ADR in the way that we question how there could have been a time where seat belts were optional in our cars.

1. Bernard Mayer, in his book, Staying with Conflict: A Strategic Approach to Ongoing Conflict, discusses the "managing" of conflict as opposed to "resolving" conflict. Often, the focus of Alternative Dispute Resolution is on "resolution." It is enough to say here that there are many instances (think of armed conflicts) where managing a conflict is feasible but resolving it probably is not. Mediators, alert for opportunities to manage conflicts where resolution is elusive, can often help clients reach valuable agreements; otherwise, mediation may well break down, leaving the parties to turn to litigation. Further, parties themselves may (for good reason) be skeptical that their disputes can be solved, and so skeptical of ADR altogether; but when put in terms of managing their conflicts, they may believe a mediated settlement to be possible and realistic.

2. Roger Fisher and William Ury, Getting to Yes: Negotiating Agreement Without Giving In, Penguin Books, 1983.

3. https://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf.

4. It is important to note that there are different opinions regarding mediating cases where there has been domestic violence. A brief overview of the question can be found in the article Divorce and Domestic Violence at https://www.newyorkfamily.com/divorce-and-domestic-violence/.

5. Cases involving deep mistrust and/or intractability are unlikely to be successful in mediation, but caution is warranted here. A spouse can have broken trust in the spousal relationship by having an affair, but still be trusted as a fit – or even excellent – parent, allowing for successful mediation. But if the spouse is (suspected of) hiding assets, or isn't trusted to carry out agreements after they are reached, agreements are unlikely to be reached, or at least fulfilled. Concerning intractability, a party who will not compromise is a poor mediation candidate; but here, too, caution should be shown. I have worked with any number of clients who began mediation with uncompromising positions, but after starting mediation, learning that they are being heard by the mediator, and maybe becoming less fearful, experience a shift and show the ability to move away from inflexible positions.

6. I first learned of the question being posed to parents in this manner from The Family Mediation Casebook: Theory and Process, Stephen K. Erickson and Marilyn S. McKnight Erickson, Brunner/Mazel, Inc. 1988.

7. In that same article, I argue that attorneys who fail to educate potential clients about ADR are violating an ethical duty, https://www.newyorkfamily.com/is-mandatory-mediation-a-good-idea/).

8. There will be the cost of mediation itself, and there are plans calling for "ADR to be offered [by mediators] for free, in part." For instance, mediators might work with clients pro bono for the first ninety minutes; after that, if the clients were to continue with mediation, they would pay the mediator's fee directly (a fee that the mediator would have set beforehand).

9. Judge Silver added:

> Judge Marks, who has been guiding and leading this initiative and providing significant support for both Judge Caruso and myself, suggested some edits for certain parts of the plans and those are currently being incorporated. Many parts of these plans needed little editing so they are currently being rolled out. For instance, in the Bronx, we have already completed some very successful "Blockbuster" settlement days with a certain insurance company (where we settled 60% of the cases that were on the calendar) and we just recently scheduled five "Blockbuster" days with another insurance company in Queens.