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Alternative Dispute Resolution

N.J. Courts' Presumptive Mediation Program

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In 1992, a forward-thinking New Jersey Supreme Court established a program for "complementary dispute resolution" (CDR). This refers to court-annexed dispute resolution programs, as opposed to privately run programs, which are referred to as "alternative dispute resolution" (ADR).

More recently, the court established a program of presumptive mediation in all civil, probate and estate-related disputes. The New Jersey system is highly regarded by our neighboring states which are looking to alternative methods to resolve disputes in order to help the courts during this crisis period of budget cutting.

A unique feature of the New Jersey CDR system is the early issuance of an order to mediate, appointing a mediator from a roster established by the court. By initiating mediation early in the case, the court order provides an opportunity for settlement when neither party may wish to introduce the idea of negotiating a settlement. Another major feature of this program is that two free hours of mediation services are provided before the mediators may charge for their time — one hour of preparation and one hour of in-person mediation. The order also gives the parties 14 days to select their own mediator by agreement. If parties select nonroster mediators, the mediators are paid from the outset.

To the surprise of many, early resolution subject to targeted and limited disclosures under the management of the mediator is often highly successful. The courts' current statistics indicate that for cases that actually went to mediation over the 10 years preceding 2011, approximately 30 percent were resolved. This is a very significant percentage for mediations held either before discovery, or after very limited discovery. Most mediations in other systems take place later in the case, once the costs of discovery and motions have already been incurred, and the court has had to engage in motion practice and case management. Therefore, when it is successful, early dispute resolution can mean an enormous saving to the parties and the courts.

Judicial economy is achieved by eliminating the need for further administration, motion practice, jury selection and pretrial motions, and economy is achieved for the parties because discovery is the most costly component of all cases. While the vast majority of cases do not go to trial in New Jersey's courts — or any other courts because 98 percent are resolved before trial — when settlement happens on the courthouse steps, most of the costs have already been incurred.

The presumptive mediation program basically applies to all New Jersey civil cases, so virtually all litigators and litigants in New Jersey with civil matters feel the impact and the influence of exposure to mediation as a process.

In January 2011, the CDR Committee of the Supreme Court reported that the labor-intensive administration of the program needed to be revisited given the budgetary strains on the system. The CDR Committee also expressed concerns with the training of some of the mediators, particularly in case management, ethics and program guidelines. There was also information from administrators that a few mediators repeatedly called court personnel with procedural or other questions.

In response, the CDR Committee altered some of the rules to reduce the reporting of the mediators to the CDR point persons and to eliminate the process for seeking mediation fees by filing an order to show cause. Mediators must now seek any unpaid fees in an independent court proceeding. Mediators are also being encouraged to make any inquiries to the Mediator Mentoring and Facilitation Committee rather than to court personnel. In addition, under the new rules, mediators are encouraged to engage in case management to further assist the courts.

The Dispute Resolution Section of the New Jersey State Bar Association (NJSBA) has dedicated itself to supporting New Jersey's court-ordered mediation program. During this year, the goal is to address deficiencies identified by court personnel,

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lawyers and their clients who have used the system, and to assure that this cost-effective method endures and is improved. The Dispute Resolution Section's goal is to assure that the CDR program meets the needs of litigators, the courts, and the parties by providing additional trainings and resources for the roster mediators.

The value of mediation has been well established. Now we need to make sure that our system puts mediation's best foot forward so that it becomes apparent that professional mediators add real value for the parties and the courts. The Dispute Resolution Section also hopes to focus on more demanding training standards and to borrow best practices from other states and federal court systems.

All over the country, parties and litigators have expressed high levels of satisfaction with the process of mediation and ADR as part of a multidoor courtroom. Mediation provides a confidential and creative alternative tailored to address the needs and interests of the parties and not limited by the legal remedies available in court. The parties are in control of the process and their own solution; it is not dictated to them. Mediation can avoid the total rupture of relationships and can help parties to see a new and better way to communicate. The high level of satisfaction that parties and counsel experience with mediation is an independent and important reason to continue to support and improve New Jersey's system.

One of the first completed projects of the NJSBA Dispute Resolution Section for this year is the creation of two checklists, one for advocates in mediation and one for mediators. The function of the checklists is to assist newer mediators or those who have not recently mediated, and to establish a clear path toward preparation and administration of mediations. These aids for roster mediators are coordinated with the Mediator's Toolbox or FAQs approved by the CDR Committee. Links to the complete checklists are available within the digital version of this article on the *Law Journal*'s website at www.njlj.com.

Below is an excerpt from the advocates' checklist, regarding the actual mediation session:

1. Remember that mediation is assisted negotiation and the person who must agree is the opposing party. Resist the temptation to show your client how strong your case is; keep the presentation non-accusatory. Client will often rely on counsel, not mediator, for business, as well as legal advice. Object is not to "win" but to arrive at an amicable resolution.

2. The process is yours! Ask for a caucus if you need one at any time to get assistance from the mediator.

3. If settlement is reached make sure there is a signed writing at mediation session — at least a Memorandum of Understanding and preferably a Settlement Agreement. Be concise. Highlight the principal terms. Mediator should not act as scrivener.

4. Discuss the process with adversary and the mediator, and decide who will serve as the scrivener to work out final text of Settlement Agreement within an agreed upon time period after the mediation session.

5. If no settlement is reached, consider scheduling a 2nd mediation session and discuss what further discovery may be useful/necessary prior to 2nd session.

6. Utilize mediator for discovery case management and to resolve potential discovery issues. Consider filing a Stipulation of Discovery Schedule/Case Management Consent Order with court.

The concept of checklists was inspired by Atul Gawande's *Checklist Manifesto* (Metropolitan Books 2009). Gawande, a physician, has developed a series of checklists for the medical profession and has found that requiring, for example, surgery teams to check off the steps they always believed they were following improved, by surprising percentages, the survival rates of patients. We hope that by consciously bringing to the fore the steps in the process that mediators and advocates may take for granted, we will improve the practice of mediation and also improve the advocates' process of preparation. One of the steps that advocates will find on their checklist is to consider the possibility of a party-selected mediator within the initial 14-day period before the court-assigned mediator is established as the mediator for the case. This reminder of an opportunity to select a specialist or a mediator that the parties may have worked with is a protection against letting the time run without considering this option.

The advocates' checklist also reminds the advocate to prepare a risk assessment of the case in order to advise the client of the risk-assessed projected outcome at trial. This is a critical preparatory step that is often overlooked in the conversation with the client. Unless the client knows the legal budget and the best alternative to a negotiated outcome, a realistic assessment of a negotiating range is nearly impossible and the client may be anchored in an unrealistic expectation.

The presumptive mediation program is under a one-year probationary period. The Dispute Resolution Section hopes that the assessment of its success will allow it to continue, and that mediators and the bar will find additional ways to help it improve. The public and the judiciary are well-served by having mediation available, and indeed mandated, as an important adjunct to litigation. ■