

# ADR Workshop for Court Attorneys



October 16, 2019

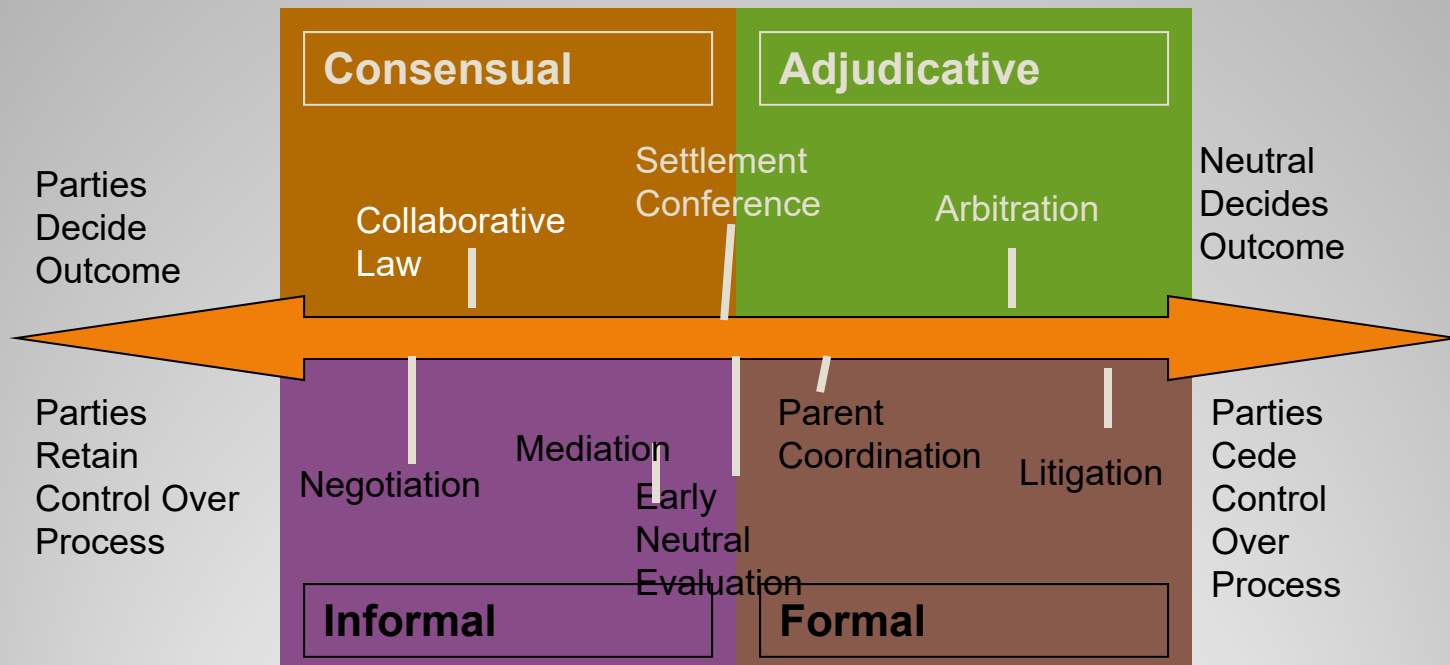
Presenters: The Hon. Cheryl Gonzales and Lisa M. Courtney, Esq.  
NYS Unified Court System's Statewide ADR Office

- Understand what is ADR
- Share techniques to use in a settlement conference
- Learn about resources outside the court system

Goals

- ADR= Alternative Dispute Resolution
- ADR = *Appropriate* Dispute Resolution

What is ADR?



# The ADR Continuum

*“The time is right to provide litigants and lawyers with a **broader range of options** to resolve disputes without high monetary and emotional costs of conventional litigation.*

*We consider this vision of ADR . . . an integral part of our **Excellence Initiative.**”*  
-- Chief Judge Janet DiFiore

**State of Our Judiciary**

*“Unless appropriate exceptions apply, most civil cases will be automatically presumed eligible for early referral to court-sponsored mediation.”*

-- Chief Judge Janet DiFiore

*“We are all in!”* -- Chief Judge Janet DiFiore

**State of Our Judiciary (cont'd)**

- Eliminate backlogs
- Enhance quality of justice
- Provide better and more comprehensive services to the public
  
- Increase utilization of mediation
- Propose programs for expansion
- Build on existing framework

**Revitalize Commitment to ADR:  
Part of the Excellence Initiative**

- Mediation: confidential dispute resolution process in which a neutral third party --- the mediator -- helps parties identify issues, clarify perceptions, and explore options for a mutually acceptable outcome.



Mediation



- Voluntary
- Confidential
- Party-Centered

**Core Values: Mediation**

- Reduces cost
- Reduces stress
- Empowers parties
- Improves communication
- Improves relationships
- Results in longer-lasting agreements
- Improves party satisfaction



## Benefits of Mediation

"Litigants . . . view their court significantly more favorably when they knew it offered mediation . . .

[O]ur findings suggest that courts should market their mediation programs in ways that litigants will find memorable over the long run."

Donna Shestowsky, *When Ignorance is Not Bliss: An Empirical Study of Litigants' Awareness of Court-Sponsored Alternative Dispute Resolution Programs*, 22 HARV. NEGOT. L. REV. 189, 233 (2017)

Litigants Like Mediation Programs

- Domestic violence
- Bullying
- Bad faith
- Hidden assets
- Abuse of process



Concerns with Mediation

Mediation	Settlement Conference
Confidential	Not confidential
Enough time/sessions to address a wide range of issues	Brief sessions focused on settling the legal issues
Clients participate directly; Counsel may also assist	Counsel participates directly; client may not be present
Can be utilized at any stage of the court process	Typically utilized after discovery and trial preparation
Training required under Part 146 requires minimum of 40 hours of training as well as experience.	No training reqs, but typically done by experienced and knowledgeable Court Attys

## Settlement Conference vs. Mediation

- Pre-Mediation
- Opening Statement
- Information Gathering
- Identifying Issues (Agenda)
- Generating Movement
- Closure

## Stages of Mediation

- What structure do you create -- or could you create -- for your conferences?
- What techniques do you use to facilitate settlement?
  - **Audience**
    - Collegial sharing in groups of 4
    - Note taker
    - Reporter: report back
  - **Panel**

## Audience Techniques

Step 1: M inquires of -----► P

Step 2: P responds, asserts --- ► M

Step 3: M demonstrates and confirms understanding ---► P

Step 4: P responds ———► M

- If no, go back to Step 1 and ask:  
“What am I missing?”
- If yes, loop is complete. To further understanding, mediator can ask:  
“Is there more?” and return to Step 1.

## Loop of Understanding



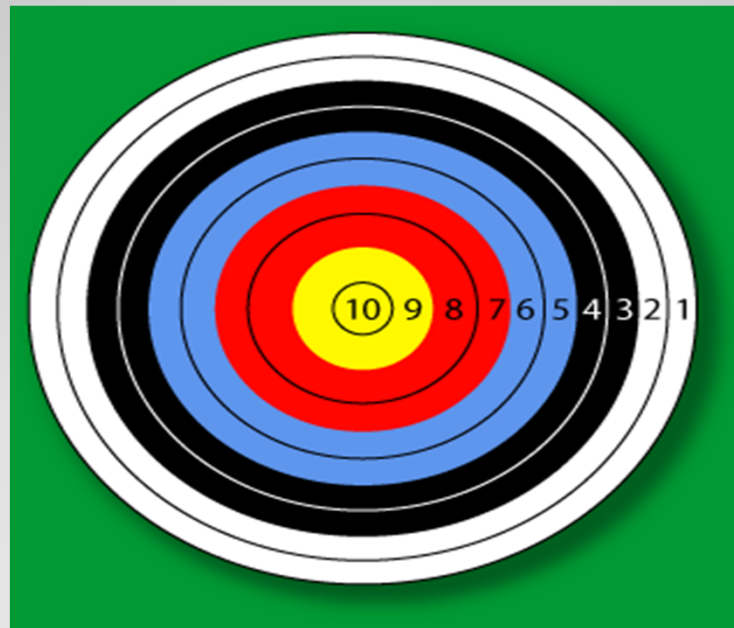
- Find a partner
- Think of a conflict: not too personal but not too insignificant
- Choose first speaker
- First speaker tells what happened
- The listener “loops”
- Switch roles when you hear the bell

**Practice skill**

- What worked for the listener? What was hard?
- What worked for the speaker?

Debrief

In trying to settle cases -what do mediators listen for, and what do we do with it when we hear it?



**Demands**

**Positions**

**Feelings**

**Interests**

**Principles**

**Values**

**Issues**

**Deconstructing Dialogue**

- **Positions:** What people say they want; a unilateral and sometimes inflexible proposal of one party expressing an acceptable outcome of an issue in dispute.
- **Interests:** Why people want what they want; The underlying desires and concerns which motivate people (Getting to Yes, p.41)
- **Issues:** Topic for discussion

## Understanding Positions, Interests and Issues

- Separate **Positions** from Interests (reframe) and Identify Issues
  - Example: “I’m not going to pay him any rent. He has to fix the shower. I want an abatement.”
- Try to get behind the stated position (demand) to the

- Separate Positions from **Interests**
- Example: "You want to use your shower"

"and you want your rent  
reduced."

## Bill Eddy's 3-step process for High Conflict Personalities

### Step 1: One person makes a proposal

- "I want the children during the week, and every other weekend."

### Step 2: Ask and answer clarifying questions

- For example, "When would the weekend start and end under your proposal?" "What would your proposal look like in action?" "What's your picture of how this would work?" Listen to the answers.

### Step 3: Short Response

- Yes. (I can agree to that)
- No.
- I'll think about it.

### Step 4: Repeat the process

**Skill: "So, What's Your Proposal?"**



## **Reflect and Elicit:**

“That sounds like a difficult situation. What do you think you will propose for solving it?”

“What would you propose/suggest?”

“What are some options you would like to consider?” “Do you have any ideas that might solve this problem?”

“I’m interested in your thoughts on what we should do here. . . .”

- Ask attorney for each party to state and summarize strengths of own side's position
- Ask attorney for other party to summarize, without agreeing
- Switch
- Ask attorney for each party to state and summarize how and why a decision-maker might see it differently- what facts/law might have affected them.
- Switch

**Skill: Role of Law**

- Parties feel heard
- Greater perceptions of fairness
- Parties more likely to settle
- January 2016 Maryland Study- mediator techniques of reflecting and eliciting yielded most positive results.
  - Note: surprising negative effect of mediator caucus on parties' ability to work together.

<http://mdcourts.gov/courtoperations/pdfs/familytwopagesummary.pdf>

## Benefits of Facilitative and Elicitive Techniques

- Refer to Mediation – in appropriate cases
  - New York Peace Institute (Local Community Dispute Resolution Center)
    - <http://www.nypeace.org>
    - Contact Nick Schmitt [nschmitt@nypeace.org](mailto:nschmitt@nypeace.org)
  - Community Mediation Services- Queens
  - New York Center for Interpersonal Development-Staten Island
  - IMCR-Bronx

Refer to Mediation

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## ALTERNATIVE DISPUTE RESOLUTION



- ADR Home ▾
- Programs ▾
- Learn More About ADR ▾
- Training/Events ▾
- Mediation Settlement Day ▾
- Links ▾
- Info for Contract Agencies (Secure Login)
- Contact Us / Office Locations

### Overview

#### Mission Statement

The NYS Unified Court System is committed to promoting the appropriate use of [mediation](#) and other forms of [alternative dispute resolution](#) (ADR) as a means of resolving disputes and conflicts peacefully.

#### About Us

The **Office of Alternative Dispute Resolution** is part of the Division of Professional and Court Services in the New York State Unified Court System [Office of Court Administration](#). We invite you to learn more [About Us](#).

Mediation and other ADR processes are available state-wide. Click on one of the links below to learn more.

[Involved in a CONFLICT?](#)

[Information for ADR PRACTITIONERS](#)

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