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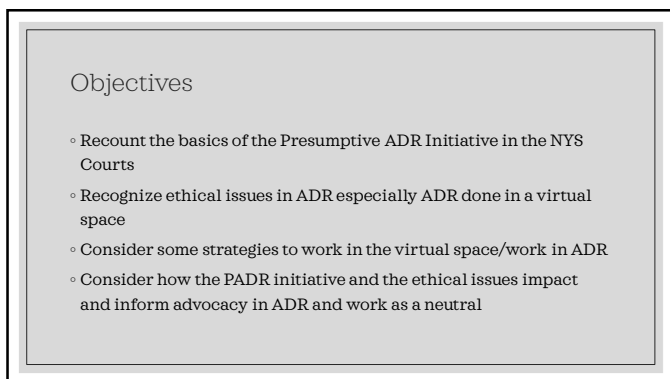
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### What is Presumptive ADR?

- litigants in most civil cases have an opportunity to use mediation or another appropriate dispute resolution process as early as possible in the life of a case
- courts and communities to work to give litigants meaningful choices about **how** to resolve their disputes

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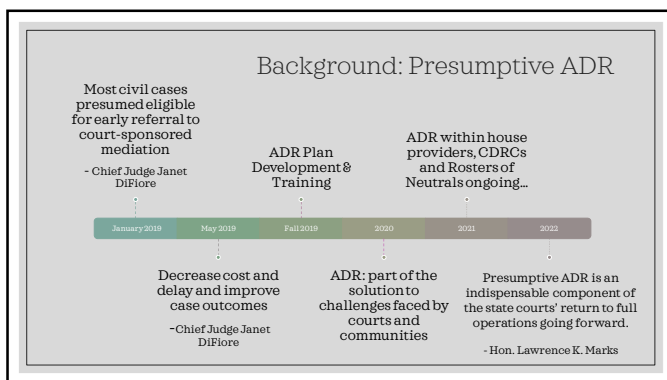
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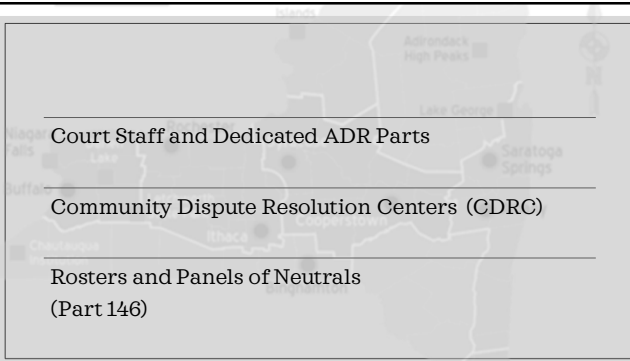
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### Court Staff and Dedicated ADR Parts

### Community Dispute Resolution Centers (CDRC)

### Rosters and Panels of Neutrals (Part 146)

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8JD ACCESSING ADR



Presumptive



Volunteer



Court Referral

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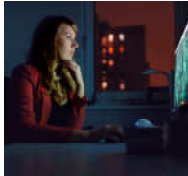
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The Virtual Space

- Pivot to on-line work
- Continuation of on-line work
- Where to go now

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NYS Rules of Professional Conduct  
(22 NYCRR 1200)

- 1.1 Competence
- 1.4 Communication
- 1.6 Confidentiality
- 2.1 Advisor

- 1.12 Judges as Neutrals
- 2.4 Lawyer as Third-Party Neutral

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## Advocacy in ADR

### Know the Process

Familiarity with the Process (Rule 1.1)  
Planning with the Neutral (Rule 1.4, Rule 1.6)  
Is this process confidential?

### Prepare your Client

Confidentiality (Rule 1.4)  
The Role of the Attorney in Each (Rule 1.1)  
Role of Advisor (Rule 2.1)  
Attorneys as Third-Party Neutrals (Rule 2.4) be clear on process and role of the neutral

### Prepare your Case

Confirm no conflicts (Rule 1.12)  
Realities of Discovery (Rule 1.4)  
Desired Language (Rule 1.1)  
Identifying BATNA/WATNA Objectives (2.1)  
Logistics of ADR sessions  
Confidentiality (Rule 1.4)

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## Mediation

Mediation is a confidential dispute resolution process in which a neutral third party -- the mediator -- helps parties:

- Identify issues
- Clarify perceptions
- Explore options for a mutually acceptable outcome

The mediator does not decide the case but helps the parties to resolve the dispute themselves

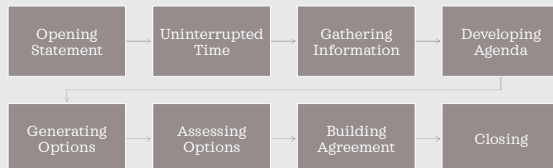
Mediation seeks to ensure that the parties arrive at a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome

Attorneys are strongly encouraged to participate

Mediation may be inappropriate if a party has a significant advantage in power or control over the other

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## Mediation Process



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## Model Standards of Conduct for Mediators

(Adopted 2005 -  
ABA, ACR, AAA)

- STANDARD I. SELF-DETERMINATION
- STANDARD II. IMPARTIALITY
- STANDARD III. CONFLICTS OF INTEREST
- STANDARD IV. COMPETENCE
- STANDARD V. CONFIDENTIALITY
- STANDARD VI. QUALITY OF THE PROCESS
- STANDARD VII. ADVERTISING AND SOLICITATION
- STANDARD VIII. FEES AND OTHER CHARGES
- STANDARD IX. ADVANCEMENT OF MEDIATION PRACTICE

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### Be Clear About Roles

- RULE 2A. Lawyer Serving as Third-Party Neutral (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. (c) When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.

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### WHEN THERE ARE OPTIONS DECIDING WHETHER OR NOT THIS CASE SHOULD GO TO MEDIATION

**Perhaps...**

- Strong emotional issues which the parties need to discuss in a confidential setting
- The parties wish to have control over the outcome
- The parties need a creative solution
- The parties recognize the need to maintain a relationship
- Cost is a concern/litigation is costly
- The parties wish to increase future compliance

**Perhaps not...**

- There is a history of abuse
- A party is unable to function in this setting (See also, Diminished Capacity 1.14...consider supports that could assist)
- One party is planning to misuse the process
- The problem is unmediatable
- There is a benefit to the matter being handled in the light of day/publicity

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## Consulting with Clients

The lawyer shall consult with the client with respect to the means by which the client's objectives are to be pursued. See Rule NY Rules of Professional conduct 1.2; 1.4

### Consider discussing:

- Are you in a place we can talk (1.6)
- The nature of each process
- The costs involved
- The time involved
- The amount of control the client will have in the outcome of the process
- Make a recommendation

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## Suggestions for clients

### ACTIONS...

- Try to focus on problem solving
- Do not attack the other side
- Think about the future
- Listen
- Do not interrupt
- Ask to privately speak to the mediator or your attorney if you need to

### THOUGHTS...

- What is most important to you
- How would you feel in the other parties' shoes
- What other factors are causing these problems
- What kind of relationship do you want to have in the future
  - What needs to happen to create that relationship
- What would it feel like to you if this dispute was resolved?

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## Checklist Attorney Client Meeting

### Mediation

- Presumptive/Court Ordered/Voluntary/confidential/role of the mediator
- Mandated reporters...
- Potential benefits
- Potential Drawbacks

### Current Case

- Strengths/Weaknesses
- Costs of litigation/Timing (reunification with money)
- Concerns with damage to relationships in litigation
- Effect on others (children, workers)
- Range of acceptable outcomes

### Mediation Process

- Where to go/ who to speak to/plan for X hours/virtual space planning (background, tools, practice, at home or at my office?)
- Who will be present
- If attorney won't attend how can attorney be reached
- Process: opening statements, generating options, possible private meetings, written agreement,
- Protections for attorney review of mediated agreements
- How will attorney/client share time in the mediation session
- What information/documents will be brought for reference or to share with the table

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## Respect the Process

- Act in good faith.
- Be as respectful and pleasant as possible
- Let the other attorneys or the parties “save face” where possible
- Encourage the parties to speak to one another...think about the many conversations most of these parties have ahead of them...give them a chance to practice use of appropriate, productive dialogue
- Be Patient there may be non-legal issues that take time evolve and resolve

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## Prepare your Case

- Remind your client that your role in mediation is different than your role in the courtroom and your behavior will be different.
- Allocation of time, who will speak - you? Your client?
- Positions/Interests
- BATNA/WATNA - are there collaborative options?
- Pre-mediation statements for submission

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## PREPARE YOURSELF

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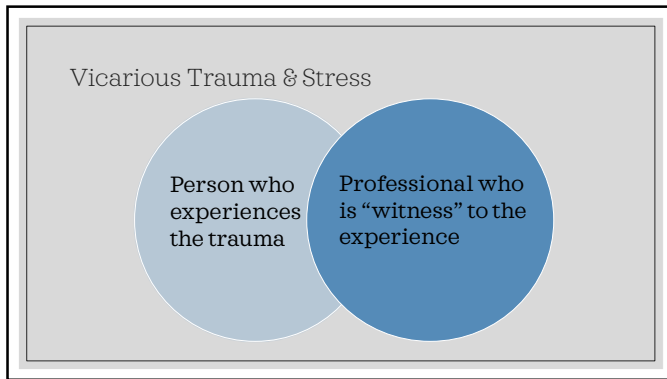
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Recognize and Repair

"I realized it was not permission, it was a duty that we had, an ethical duty that we had to attend to the ways in which trauma and vicarious trauma disrupt ourselves and to repair that on a regular basis. Without that kind of careful, ongoing care of ourselves and of the things that give us meaning, we would eventually have nothing to give our clients and no resources through which to render service."

Kah Peters on Ethics/Trauma

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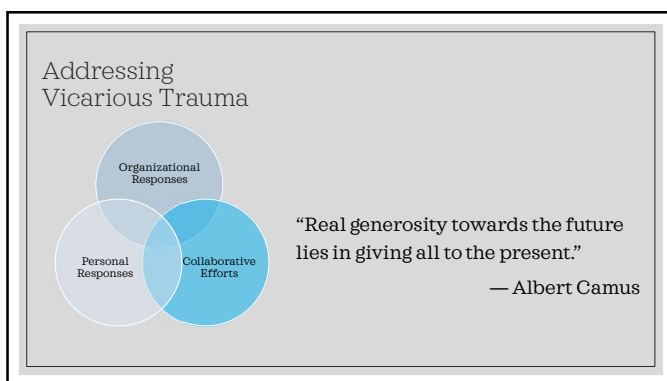
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Thank You

We learn a lot from our colleagues.

Please keep the ADR info, questions and suggestions coming:

Bridget O'Connell -  
[boconnel@nycourts.gov](mailto:boconnel@nycourts.gov)

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## Bibliography and Borrowings

- Beer, Jennifer E. and Eileen Steif, *The Mediator's Handbook*. New Society Publishers (1997)
- Roy D. Simon Jr. *Simon's New York Rules of Professional Conduct Annotated* | December 2021 Update
- Child Welfare Court Improvement Project Trauma Informed Practice series
- CDRC Manual (NY Courts Office of ADR)
- Stress, Burnout, Vicarious Trauma, and Other Emotional Realities in the Lawyer/Client Relationship: A Panel Discussion (with Marjorie A. Silver & Sanford Portnoy), 19 *Touro Law Review* 847 (2004)  
[http://digitalcommons.law.yale.edu/cgl/viewcontent.cgl?article=3213&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgl/viewcontent.cgl?article=3213&context=fss_papers)

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## Rule 1.1. Competence

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
- (c) A lawyer shall not intentionally:
  - (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
  - (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

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## Rule 1.4. Communication

- (a) A lawyer shall:
- (1) promptly inform the client of:
    - (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
    - (ii) any information required by court rule or other law to be communicated to a client; and
  - (iii) material developments in the matter including settlement or plea offers.
  - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
  - (3) keep the client reasonably informed about the status of the matter;
  - (4) promptly comply with a client's reasonable requests for information; and
  - (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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## Rule 1.6. Confidentiality of Information

- (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or third person, unless:
- (1) the client gives informed consent, as defined in Rule 1.0(j);
  - (2) the disclosure is legally authorized to advance the best interests of the client and is either reasonable under the circumstances or necessary in the professional community; or
  - (3) the disclosure is permitted by paragraph (b).
- "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is transmitted by a disclosure that, by its nature, is confidential or otherwise to the client of counsel, or information that the client has imparted to legal advisors. "Confidential information" does not include (1) a lawyer's legal knowledge or legal research or (2) information that is generally known in the legal community or in the trade, field, or profession to which the information relates.
- (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime;
  - (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on material information that is being used to further a crime or fraud;
  - (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
  - (5) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
  - (6) to establish or collect a debt or
  - (7) when permitted or required under these Rules or to comply with other law or court order.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information transmitted to him by Rule 1.6, 1.0(j), or 1.0(k).

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## Rule 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation.

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### Rule 2.4. Lawyer Serving as Third-Party Neutral

- (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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### Rule 1.12. Specific Conflicts of Interest for Former Judges, Arbitrators, Mediators or Other Third- Party Neutrals

- (a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.
- (b) Except as stated in paragraph (c), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:
- (1) an arbitrator, mediator or other third-party neutral; or
  - (2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral.
- (c) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.
- (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
- (1) the firm acts promptly and reasonably to:
  - (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;
  - (ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;
  - (iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and
  - (iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and
  - (2) there are no other circumstances in the particular representation that create an appearance of impropriety.
- (e) An arbitrator selected as a partisan of a party in a multilateral arbitration panel is not prohibited from subsequently representing that party.

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